because their belief in the legality of the challenged conduct was unreasonable.'"[40] The court of appeals affirmed this decision on the basis of the district court's reasoning.[41]

The Supreme Court reversed. Scherer argued that "a defendant official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions."[42] The Court acknowledged that this argument was "not without some force," but declined to adopt it.[43] Instead, the Court stated that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."[44] The Court expressed concern that denying qualified immunity when plaintiffs show a "clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights" would untenably expand the qualified immunity analysis.[45] It would give judges too much discretion to select from policies they deem relevant, increase the difficulty for officials to anticipate legal consequences for their actions, and frustrate trial courts' ability to dismiss frivolous lawsuits.[46] For these reasons, the Court declined to consider the employer's policy in its analysis and held that there was no clearly established rights violation.[47]

2. The Court's embrace of policies: *Hope v. Pelzer*.

Despite *Davis*'s seemingly unequivocal statement barring consideration of non-case-law sources of clearly established law, the Supreme Court itself has cited policies when determining whether a right is clearly established. The most significant example of this application is *Hope v. Pelzer*.[48] This case concerned the Alabama Department of Corrections (ADOC) and its use of a "hitching post" as a behavioral punishment.[49] The plaintiff, Larry Hope, was incarcerated and traveling to the chain gang's worksite. He fell asleep during the bus ride and was slow to get off the bus when ordered.[50] Words between him and a guard escalated to fighting, and other guards intervened to restrain Hope and transport him back to the prison, "where he was put on the hitching post."[51] The guards left him there for seven hours in the sun with his shirt off, and he was only given water once or twice.[52] Hope sued the guards, arguing that they violated the Eighth Amendment's prohibition against cruel and unusual punishment.[53]

The Eleventh Circuit granted the guards immunity, holding that Hope failed to meet the second prong of the qualified immunity test. Although the court found that the guards had violated the Eighth Amendment by using the hitching post for punishment, it determined that "the facts in the two precedents on which Hope primarily relied" were not "materially similar," and therefore they were insufficient to show that the violation was clearly established.[54] The Supreme Court reversed. Rather than find that the precedents cited by

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40 *Davis*, 468 U.S. at 189 (quoting Scherer, 543 F. Supp. at 20).
41 *Davis*, 468 U.S. at 189 (referencing Scherer v. Graham, 710 F.2d 838 (11th Cir. June 30, 1983)).
42 *Davis*, 468 U.S. at 193.
43 *Id.* at 194.
44 *Id.*
45 *Id.* at 195.
46 *Id.* at 195–96.
47 *Davis*, 468 U.S. at 197.
48 536 U.S. 730 (2002).
49 *Id.* at 733.
50 *Id.* at 734.
51 *Id.*
52 *Id.* at 734–35.
53 *Hope*, 536 U.S. at 735.
54 *Id.* at 736 (internal quotation marks omitted) (quoting Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001)).

Hope were materially similar, the Court instead held that material similarity is not necessary for the law to be clearly established.[55] The Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[56] Here, "the Eighth Amendment violation [was] obvious," and that finding alone makes the right clearly established.[57]

In its reasoning, the Court also pointed to several policies as sources of clearly established law. Notwithstanding the finding of obviousness, it held that there were several other sources clearly establishing the right at issue:

> [I]n light of binding Eleventh Circuit precedent, an Alabama Department of Corrections [ ] regulation, and a [Department of Justice] report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the [guards'] conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[58]

Two years before Hope was handcuffed to the hitching post, the ADOC created a regulation authorizing the use of the hitching post in certain situations and requiring "that an activity log should be completed for each [ ] inmate [on the hitching post], detailing his responses to offers of water and bathroom breaks every 15 minutes."[59] The Court noted that the guards' lack of such log in this case "provides [ ] strong support for the conclusion that [the guards] were fully aware of the wrongful character of their conduct."[60] Additionally, the Court's holding that "'a reasonable person would have known' [ ] of the violation is buttressed by the fact that the DOJ specifically advised the ADOC of the unconstitutionality of its practices before the incidents in this case took place."[61] Because the guards in this case had "fair and clear warning" of the wrongful nature of their conduct, the Court held that they violated clearly established law and denied their defense of qualified immunity.[62]

Hope stands for the proposition that clearly established law is not limited only to case law in which the specific facts of the case have previously been found to violate rights; rather, an officer's conduct can be so obviously violative of rights that the officer is denied qualified immunity even without a precedential case on point.[63] In other words, there is an obviousness exception to the clearly established law prong of the qualified immunity test.[64] This

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55 *Id.* at 741 ("Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts.").

56 *Id.*

57 *Id.* at 738.

58 *Id.* at 741–42 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

59 *Hope*, 536 U.S. at 744.

60 *Id.*

61 *Id.* (citing *Harlow*, 457 U.S. at 818). "[T]he DOJ advised the ADOC to cease use of the hitching post in order to meet constitutional standards." *Id.* at 745. Notably, the Court did not require that these particular guards knew about the DOJ's recommendations:

> Although there is nothing in the record indicating that the DOJ's views were communicated to [the guards], this exchange lends support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment.

Id.

62 *Hope*, 536 U.S. at 746 (quoting *Lanier*, 520 U.S. at 271).

63 *Id.* at 741.

64 Benjamin S. Levine, *"Obvious Injustice" and Qualified Immunity: The Legacy of* Hope v. Pelzer, 68 UCLA L. REV. 842, 862 (2021). Since the Court decided *Hope*, it has given very little guidance about how exactly to apply the obviousness exception. For several years after *Hope*, "the Supreme Court [ ] appeared to retreat substantially from the decision." *Id.* at 863. But in 2020, the Court decided *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020), in which it relied explicitly on *Hope*'s obviousness exception

obviousness exception means that an officer can be denied qualified immunity even in factually novel circumstances. It also provides an additional legal argument for plaintiffs to challenge qualified immunity: they can argue—either in addition to pointing to analogous case law or in the alternative—that the officer's actions were so obviously wrong that no prior case law is necessary to have put the officer on notice that their actions were wrongful.[65]

Hope belies *Davis*'s assertion that only case law qualifies as clearly established law. *Hope* was decided after *Davis*—and did not mention *Davis* at all—but there is no indication that *Hope* overturned *Davis* or that *Davis* is no longer good law. In fact, the Court has cited *Davis* in the years since *Hope*.[66] While the Court has not provided a definitive answer for the role that policies should have in the second prong of the qualified immunity test, *Hope* suggests there is room in the analysis for their consideration.

B. Discord and Disagreement in the Lower Courts

Predictably, the Supreme Court's ambiguity concerning the use of policies as clearly established law has created confusion and inconsistency among the lower courts. There is no discernable principle controlling when courts consider policies in the qualified immunity analysis and when they reject them as irrelevant. Sometimes courts cite *Davis* or *Hope* to support their rejection[67] or consideration[68] of policies; sometimes courts reject or consider policies without any justification.[69] Part II.B.1 provides examples of internal inconsistency within circuits. It shows that, even within a single circuit, different cases take opposite stances on whether to consider policies in the qualified immunity analysis. Part II.B.2 discusses why courts choose to cite policies in their analyses. It suggests that courts use policies because of qualified immunity's underlying rationale of notice: officers are more likely to be on notice of their department's policies than on notice of case law, and judges are responding to this reality by citing information that officers realistically should have known. Although it is clear that the lower courts have taken positions on whether policies should factor into the qualified immunity analysis, they have not grappled with the rationales for these positions. The result is a fractured and unreasoned application of policies that can depend on the location of the alleged conduct or the particular panel of judges hearing the case.

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to deny qualified immunity. Levine, *supra* at 870. Levine commented that in *Taylor*, "the Court clearly answered the question of whether *Hope* remains good law, [but] it provided little insight regarding when courts should apply it." *Id*. at 871.

65 Levine found that circuit courts follow one of two approaches to the clearly established law analysis: some circuits "default to a search for reasonably similar precedent and treat the possibility of obvious violations as something of an outlier," while others follow a "multitrack" approach in which "the possibility of obvious violations [is] baked into . . . the clearly established analysis," which "obligate[s] judges at minimum to acknowledge the possibility that any given case that c[omes] before them could present an obvious violation." Levine, *supra* note 64, at 899–900.

66 *See* Ziglar v. Abbasi, 582 U.S. 120, 151–52 (2017) (quoting *Davis*, 468 U.S. at 195) (noting that clearly established law must be narrowly interpreted, because "[t]o subject officers to any broader liability would be to 'disrupt the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties'").

67 *See, e.g.*, Verret v. Ala. Dep't. of Mental Health, 511 F. Supp. 2d 1166, 1176 (M.D. Ala. 2007) ("[T]his Court will follow the binding precedent established by *Davis* and hold that [the defendant's] violation of policy 20–16 does not forfeit her right to qualified immunity.").

68 *See, e.g.*, Furnace v. Sullivan, 705 F.3d 1021, 1027–28 (9th Cir. 2013) (observing that "in *Hope*, for example, the Supreme Court looked to rules promulgated by the Alabama Department of Corrections to aid it in determining whether a prison guard was on notice of constitutional limitations on the use of force," and therefore evaluating the prison's policy in this case as "relevant to determining whether the officers could have thought their conduct was reasonable and lawful").

69 *See, e.g.*, Stamps v. Town of Framingham, 813 F.3d 27, 42 (1st Cir. 2016) (explaining that "police officers are customarily taught not to do what [the officer] did. . . . Not only had the unreasonableness of [the officer's] alleged conduct been clearly established as a legal matter, but it had also been well established in a manner that is actually useful to police officers" through policy and training).

1. Internal inconsistency.

The inconsistency in lower courts' consideration of policies cannot accurately be described as a circuit split, because there is inconsistency even within circuits. For example, the Tenth Circuit has both approved and renounced the consideration of policies in the qualified immunity analysis. In *Weigel v. Broad*,[70] the Tenth Circuit placed significant emphasis on officer training in a case in which Highway Patrol Officers killed Bruce Weigel by asphyxiation, restraining his hands and feet and applying pressure on his back while he was on the ground.[71] The Tenth Circuit held that the officers were not entitled to qualified immunity because they should have known not to restrain the decedent in that way.[72] The court detailed that officers were trained precisely not to do what they did to Weigel: "Numerous training materials provided to the troopers addressed the risks of putting weight on an individual's back when the person is lying on his stomach. During the troopers use-of-force training . . . they were provided with extensive written materials, oral lectures, and audiovisual presentations regarding the dangers of . . . positional asphyxiation."[73] The Tenth Circuit's clearly established law finding did not rely on case law at all[74] and was unequivocal that the department's policies alone served as clearly established law: "The defendants' training informed them that the force they used upon Mr. Weigel produced a substantial risk of death. Because it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect . . . defendants' unnecessary use of deadly force violated clearly established law."[75]

However, the Tenth Circuit's assertion in *Weigel* that police training is relevant to the qualified immunity analysis is not consistent across all its cases. In *Frasier v. Evans*,[76] the Tenth Circuit explicitly rejected consideration of police training as clearly established law in a case about First Amendment rights.[77] This case arose when Levi Frasier recorded a video of police officers using force while arresting a suspect, and the officers responded by seizing his tablet and searching for the video without his consent.[78] The district court found that the defendant officers "were not entitled to qualified immunity because they actually knew from their training that such a First Amendment right purportedly existed."[79] The Tenth Circuit reversed, unequivocally stating that the officers' training could not be considered in the analysis: "judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry."[80] According to the Tenth Circuit in this case—and despite *Weigel*—training can never provide the basis for clearly established law.[81]

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70 544 F.3d 1143 (10th Cir. 2008).

71 *Id.* at 1148–49.

72 *Id.* at 1153.

73 *Id.* at 1149–50.

74 Interestingly, the Tenth Circuit also discussed the facts of a similar precedential case, but not for the purpose of finding a court case that clearly established the law. Rather, the court found this precedent noteworthy because of its relation to the officers' training program: "[The prior case] turns out to be highly relevant to this case, but not for its legal teaching. Rather, the opinion was apparently the reason for the extensive [ ] training on positional asphyxia that we describe above." *Id.* at 1154.

75 *Weigel*, 544 F.3d at 1155.

76 992 F.3d 1003 (10th Cir. 2021).

77 *Id.* at 1015.

78 *Id.* at 1008.

79 *Id.* at 1015.

80 *Id.*

81 *Frasier*, 992 F.3d at 1019 ("[I]t is beyond peradventure that judicial decisions concretely and authoritatively define the boundaries of permissible conduct in a way that government-employer training never can. Thus, irrespective of the merits of the training that the officer defendants received concerning the First Amendment, it was irrelevant to the clearly-established-law inquiry here.").

The Tenth Circuit is not the only circuit to display internal inconsistency regarding the consideration of policies as clearly established law,[82] and yet, courts have not grappled with this irregularity. In none of these cases did the court distinguish or even acknowledge the discrepancy in the use of policies within the circuit. The dichotomy between *Hope* and *Davis* does not explain the disparity either: *Frasier* did not cite *Davis*, and while *Weigel* cited *Hope*, it did not mention *Hope*'s own use of policies in its reasoning.

2. Policies as providing realistic notice.

As a general matter, when courts do consider policies to determine whether a reasonable officer would have been on notice that their actions were wrongful, they are more likely to find that clearly established law was violated and deny qualified immunity. This may be because policies add to the collection of clearly established law, making it more likely that a court finds an analogous situation to the conduct at issue.[83]

When courts rely on policies to deny qualified immunity, typically they cite policies in addition to case law as clearly established law.[84] In these cases, courts could have denied qualified immunity without any reference to policies, but instead chose to include a discussion of relevant policies to show why officers should have known their actions were improper. For example, in *Nelson v. Correctional Medical Services*,[85] the Eighth Circuit denied qualified immunity to a corrections officer who shackled an incarcerated pregnant woman while she was in labor.[86] The Eighth Circuit found that "[the plaintiff]'s protections from being shackled during labor had thus been clearly established by decisions of the Supreme Court and the lower federal courts before [the conduct at issue]. The A[rkansas] D[epartment of] C[orrections] administrative regulations in effect also reflected the constitutional protections recognized in these judicial decisions."[87] The court could have concluded that the law was clearly established merely by precedential court cases, but it instead held that policies also clearly established the law.

Much like the Eighth Circuit in *Nelson*, many courts use policies to buttress an already determined conclusion—the case would come out the same way if policies were not considered.[88] So why include a discussion of policies at all? The answer may lie in qualified immunity's basis in notice. As explained above, the justification for qualified immunity is rooted in the idea that officers should be liable only when they had fair warning that their

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[82] *Compare* Nelson v. Correctional Med. Servs., 583 F.3d 522, 533–34 (8th Cir. 2009) (denying qualified immunity for officers who shackled an incarcerated pregnant woman in labor in violation of the prison's regulations) *with* Anderson v. City of Minneapolis, 934 F.3d 876, 884 (8th Cir. 2019) (granting qualified immunity for first responders who failed to properly treat a person with hypothermia in violation of department regulations); Mercado v. City of Orlando, 407 F.3d 1152, 1160 (11th Cir. 2005) (denying qualified immunity for a police officer who violated a plaintiff's Fourth Amendment rights by shooting him in the head with "less lethal" munitions in violation of the department's policy) *with* Knight *ex rel.* Kerr v. Miami-Dade Cnty., 856 F.3d 795, 813 (11th Cir. 2017) (granting qualified immunity to police officers who violated their pursuit policy, which led to the police shooting into the decedent's car, wounding one person, and killing two others).

[83] *See Notable Findings*, INST. FOR JUST., https://perma.cc/M39F-5PN5 ("The larger the federal circuit population, the easier it is to overcome qualified immunity. That's because larger circuits have more cases; more cases result in more SOCELs [Statements of Clearly Established Law]; and more SOCELs provide more opportunities to overcome qualified immunity.").

[84] This is much like the Supreme Court's opinion in *Hope*: "Even if there might once have been a question regarding the constitutionality of this practice, [circuit precedent] as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful." *Hope*, 536 U.S. at 745–46.

[85] 583 F.3d 522 (8th Cir. 2009).

[86] *Id.* at 533–34.

[87] *Id.* at 533; *see also id.* ("Since these rules were in effect when [the officer] was hired, trained, and retrained and remained in effect when she accompanied [the plaintiff] to the hospital, her knowledge of them is presumed and they applied to her decisions and actions.").

[88] *See, e.g.*, *Stamps*, 813 F.3d at 42 (denying qualified immunity to a police officer who accidentally shot and killed an unarmed and nonthreatening man during the execution of a search warrant because both precedent and policies clearly established the constitutional violation).

conduct was unlawful.[89] The clearly established prong of the test is meant to protect officers when they could not have known of the illegality of their conduct.[90] However, relying on case law as clearly established law assumes that case law actually provides notice to police officers. Empirically, this assumption is false: Professor Joanna Schwartz found that police officers are not taught the holdings of cases or trained based on what the courts find constitutes clearly established law.[91] And even if there were efforts to regularly inform officers of developments in case law, Professor Schwartz points out that "[t]here could never be sufficient time to train officers about all the court cases that might clearly establish the law for qualified immunity purposes," and regardless, officers would be extremely unlikely to actually recall those court decisions at the moment they take action.[92] In this sense, qualified immunity is based on a legal fiction: it is designed to protect only officers who could not have known that their conduct violated case law, while assuming those officers actually are informed about that case law.

It is possible that courts cite policies in addition to case law as a means of rectifying this legal fiction at the heart of qualified immunity. While courts can deny qualified immunity based on case law alone, they sometimes choose to additionally confirm that a reasonable officer in the defendant's position would have *actually* been on notice that their conduct was unlawful because their own department's policies advised them not to take those actions. When an officer is explicitly trained not to put weight on a person's back while they are handcuffed on the ground to prevent unnecessary deaths, and the officer violates those policies while killing a person,[93] the court can confidently state that a reasonable officer in their position would have been on notice of the clearly established law they violated.[94] The black-letter qualified immunity doctrine does not require such analysis, but it satisfies the original justifications of the doctrine to ensure that a reasonable officer would have had actual notice of the clearly established law. As the First Circuit put it, policies can clearly establish law "in a manner that is actually useful."[95]

On the other side, judicial disregard of policies that inform officers of potential constitutional violations creates a qualified immunity paradox: courts are granting immunity to officers who actually knew their actions violated rights based on the legal fiction that those officers would not have known of case law determining their actions violated rights. Without on-point precedent, if an officer's own department policies explain that an action would violate the law—and the officer performs that action anyway—the officer is entitled to qualified immunity because they were not on notice that their actions would violate "clearly established law." The doctrine's reliance on an objective reasonable officer is the reverse of reality: this "reasonable officer" is assumed to have encyclopedic knowledge of all their circuit's qualified immunity case law but does not know their own department's policies.

This paradox was on display in the case of the officers who forcibly took Frasier's tablet to delete a video without his consent, which the officers were told in training was a First Amendment violation.[96] The court said that the officers' actual knowledge of the illegality of

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89 *See supra* Part I.

90 Anderson v. Creighton, 483 U.S. 635, 640 (1987).

91 Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 672–73 (2021) [hereinafter Schwartz, *Qualified Immunity's Boldest Lie*].

92 *Id.*

93 *Weigel*, 544 F.3d at 1150.

94 Often, when policies are used to bolster denials of qualified immunity that can be reached only by citing case law, the facts are particularly egregious. From a legal realist perspective, it is possible that judges are also citing departmental policies in these cases to support their intuition that these plaintiffs should get their days in court.

95 *Stamps*, 813 F.3d at 42.

96 *Frasier*, 992 F.3d at 1011–12.

their actions was not enough to deny them qualified immunity: "even if the officers subjectively knew—based on their training or from municipal policies—that their conduct violated Mr. Frasier's First Amendment rights," they were still entitled to qualified immunity because the fictional reasonable officer who gets information about constitutional rights from case law could not have known that such actions would violate Frasier's rights.[97] If qualified immunity is meant to protect "all but the plainly incompetent or those who knowingly violate the law,"[98] why should an officer with actual notice of the illegality of their actions still get immunity?

III. INCORPORATING POLICIES AS CLEARLY ESTABLISHED LAW

Departmental policies currently occupy a problematic gap in the qualified immunity doctrine. Because of the absence of a clear statement from the Supreme Court about the applicability of policies as clearly established law, lower court consideration of policies has been inconsistent and arbitrary. This lack of uniformity has troubling theoretical implications. Qualified immunity relies on a theory of notice, so it is doctrinally inconsistent that officers who are sued for their actions cannot reliably know whether their department's policies will play a role in the determination of their immunity.

This Part discusses how and to what extent departmental policies should be considered in the qualified immunity analysis. * * * Finally, Part III.D presents a middle-ground solution that considers policies as an objective factor in the obviousness analysis. This solution situates policies as having a limited role that assists judges in determining when conduct obviously violates clearly established law.

A. Pragmatic Implications of Considering Policies

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B. Within the Spectrum that Precedent Allows: From *Hope* to *Davis*

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C. Which Policies Apply

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D. Policies As an Objective Factor in Judging Obviousness

A measured way to standardize the use of policies in the qualified immunity analysis is to allow for their consideration in a limited capacity to facilitate the finding of clearly established law for cases in which there is not already on-point case law. The Supreme Court has established two methods for fulfilling the second prong of the qualified immunity test: on-point case law or a finding that the violation was obvious.[99] Of the two, the obviousness method stands out as more ambiguous.[100] The use of policies in order to bolster a finding of clearly established law by in-circuit precedent may provide an alternative to relying on the legal fiction at the heart of the clearly established law inquiry, but it is largely symbolic. In

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97 *Id.* at 1019.

98 Malley v. Briggs, 475 U.S. 335, 341 (1986).

99 *See supra* Part II.A.2.

100 Richard B. Golden & Joseph L. Hubbard, Jr., *Section 1983 Qualified Immunity Defense: Hope's Legacy, Neither Clear nor Established*, 29 AM. J. TRIAL ADVOC. 563, 584 (2006) (explaining that "*Hope* applied a hopelessly ambiguous fair warning standard" to the qualified immunity test).

contrast, policies can play a functional role in cases of obviousness by inserting greater objectivity into the analysis.

Although *Hope* addressed a problematic loophole in the qualified immunity doctrine by introducing the obviousness exception, it created its own challenges. Prior to *Hope*, if an officer committed a constitutional violation in a creative or especially egregious way, they would be entitled to qualified immunity because of the lack of any factually analogous precedent in the case law.[101] *Hope* ensured that escalating the atrocity of the constitutional violation would not raise the probability of immunity in court. However, some criticized *Hope* for departing from the justifications for qualified immunity by undermining the requirement of notice.[102] Obviousness is in the eye of the beholder, and the Court did not offer any guidance on how to define obviousness. In the absence of a clearly articulated standard, *Hope*'s obviousness test "amounts to the equivalent of Justice Stewart's 'I know it when I see it.'"[103]

Considering departmental policies in the obviousness analysis mitigates these criticisms. First, as discussed at length above, relying on policies substantially increases the likelihood that officers will have actual notice of conduct that will likely violate constitutional rights. This addresses the concern that the obviousness test is entirely retrospective and that it eradicates the fair notice upon which qualified immunity is justified. In fact, this approach improves upon qualified immunity's basis in fair notice because officers are more likely to be on notice about their policies than they are about case law.[104]

Second, it brings objectivity to the obviousness analysis. Judges' freedom to determine obviousness however they see fit and apply that determination retrospectively to cold facts creates "a situation where it is the judge's emotional reaction to the facts that determines whether a claim will be successful."[105] Policies offer a factually informed and democratically instituted position on what a reasonable officer should do in a particular situation.[106] Rather than relying on a judge to decide with the benefit of hindsight what a reasonable officer would obviously have done, a judge could instead look to policies created prospectively to determine how a reasonable officer would have acted. In other words, courts could rely on what officers' own departments believe are lawful and proper actions for their officers to take. Considering policies as a benchmark for obviousness constrains judges' subjective opinions with prospective information on how officers should act.

The consideration of policies would not replace other indicators of obviousness that courts sometimes use, such as general constitutional principles,[107] but provide an additional objective factor. Cases that are so clearly obvious that there would never be a written policy forbidding the action would still be resolved under the *Hope* doctrine—when the obviousness is so apparent, a policy is not needed.[108] Rather, this approach is informative for determining

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101 *See* Levine, *supra* note 64, at 908 (emphasizing that qualified immunity denials based on obviousness "are indicative of judges recognizing the untenability of requiring relevant precedent in circumstances when the injustice present in a case is palpable" and stating that those denials "overwhelmingly have been decided that way for good reason, [because] a grant of qualified immunity in these cases would truly be unjust . . . a deep social harm would be done by the dismissal of these § 1983 actions on the basis of a technicality").

102 Allen H. Denson, *Neither Clear nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 761 (2008) ("The state of the law is less certain when many cases will turn on whether a particular conclusion seems 'obvious' to a judge or not.").

103 Golden & Hubbard, *supra* note 100, at 584 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

104 Schwartz, *Qualified Immunity's Boldest Lie*, *supra* note 91, at 672–73.

105 Denson, *supra* note 102, at 761–62.

106 *See supra* Part III.A.

107 Golden & Hubbard, *supra* note 100, at 585 (explaining that after *Hope*, "notice may depend on more generalized notions of constitutional rights that are not tied to specific circumstances but that emanate from the text of the Constitution itself").

108 *See, e.g.*, K.H. *ex rel.* Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) ("There has never been a [S]ection 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.").

edge cases within the obviousness exception. When judges reasonably disagree over whether an action was obviously unconstitutional, the existence of a prospective policy that is written by those with expertise on proper officer conduct and that prohibits the action serves as an objective indicator that the action was, in fact, obviously wrong. Rather than relying on a judge's instinct for what obviousness means, the consideration of policies inserts objectivity into these edge cases.

Additionally, it is especially important to consider policies in obviousness cases. When there is a specific policy on the books that prohibits an action, it is logically less likely that an officer will commit that conduct. Because officers are less likely to act in ways that violate their policies, it is less likely that there will be a prior case that clearly establishes those actions as constitutional violations. In other words, "[t]he easiest cases don't even arise."[109] Since there is a lack of case law addressing actions that policies prohibit, it is especially important to refer to a different source of clearly established law. In this way, policies provide a signaling function (by showing that actions prohibited by policies are obvious) and an accountability function (by ensuring that officers who commit those actions in spite of their own policies are not more likely to be granted immunity).

The Ninth Circuit essentially adopted this approach when it reversed the district court's grant of qualified immunity in *Drummond*.[110] Recall that Drummond was a mentally ill man who fell into a permanent vegetative state after officers restrained him and kneeled on his back for upward of twenty minutes.[111] There was considerable evidence that the officers should have known their actions would violate his rights, including the fact that "the officers received training from their *own police department*" warning against putting pressure on a person's back or neck to restrain them.[112] The Ninth Circuit did not point to case law to hold that a clearly established right was violated in this case.[113] Instead, the Ninth Circuit said this violation was obvious and cited *Hope* as the reason to deny qualified immunity.[114] Although not stated explicitly, the policies that the officers violated served as an objective indication that the rights violation was indeed obvious. Because a reasonable officer in the defendants' position would have been on notice of and followed their own department's policies, these officers committed an obvious rights violation and were rightfully denied qualified immunity.

CONCLUSION

Qualified immunity no longer resembles the good faith defense to liability that the Supreme Court first created a half-century ago. In *Davis*, the Supreme Court acknowledged the logic that officers who do not act in accordance with their department's applicable regulations should not be immune from liability,[115] but the Court chose not to incorporate policies in the qualified immunity analysis because "once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner."[116] This Comment provides that

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[109] United States v. Lanier, 520 U.S. 259, 271 (1997).

[110] Drummond *ex rel.* Drummond v. City of Anaheim, 343 F.3d 1052, 1054 (9th Cir. 2003).

[111] *Id.* at 1054–55.

[112] *Id.* at 1061–62 (emphasis in original).

[113] *See id.* at 1062

> We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case.

[114] *Id.* at 1061.

[115] Davis v. Scherer, 468 U.S. 183, 195 (1984) ("[I]t is an appealing proposition that the violation of such provisions is a circumstance relevant to the official's claim of qualified immunity.").

[116] *Id.*

principled manner. It shows that policies can be incorporated into qualified immunity's clearly established law analysis in a way that clarifies *Hope*'s obviousness test and provides actual notice to officers prior to litigation. This both aligns the doctrine with its underlying purpose and provides a greater likelihood of accountability for individuals whose rights were violated by officers who should have known better.

Applicant Details

First Name	**Devin**
Middle Initial	**P**
Last Name	**Flynn**
Citizenship Status	**U. S. Citizen**
Email Address	**dflynn23@stanford.edu**
Address	**Address** Street **566 Arguello Way, Apt. 103B** City **Stanford** State/Territory **California** Zip **94305** Country **United States**
Contact Phone Number	**(240) 778-8800**

Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**June 2018**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 20, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review** **Stanford Journal of Civil Rights & Civil Liberties**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Letter, Dean's
deansletter@law.stanford.edu
650-723-4455

Sanga, Sarath
ssanga@law.harvard.edu
617-998-1896

O'Connell, Anne
ajosephoconnell@law.stanford.edu

Engstrom, David Freeman
dfengstrom@law.stanford.edu
650-723-9148

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DEVIN P. FLYNN

566 Arguello Way, Apt. 103B, Stanford, CA 94305 | (240) 778-8800 | dflynn24@stanford.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Stanford Law School and an Associate Managing Editor of the *Stanford Law Review*. I write to apply for a clerkship in your chambers in 2024–25. I am particularly interested in this position because I was born and raised in Washington, DC and my family still lives in the DC metro area. My significant other is also a medical student at the University of Virginia in Charlottesville.

Enclosed please find my resume, writing samples, law school transcript, and letters of recommendation for your review. The following professors are providing letters of recommendation in support of my application:

- David Freeman Engstrom, LSVF Professor in Law at Stanford Law School;
- Anne Joseph O'Connell, Adelbert H. Sweet Professor of Law at Stanford Law School;
- Sarath Sanga, William N. Cromwell Visiting Professor of Law at Harvard Law School.

In addition, Shirin Bakhshay, Thomas C. Grey Fellow and Lecturer in Law at Stanford Law School, would be happy to speak with you about my application. She can be reached by phone at (415) 860-5937 or by email at bakhshay@law.stanford.edu. I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Devin P. Flynn

DEVIN P. FLYNN

566 Arguello Way, Apt. 103B, Stanford, CA 94305 | (240) 778-8800 | dflynn24@stanford.edu

EDUCATION

Stanford Law School, Stanford, CA — J.D., expected June 2024

Awards: Gerald Gunther Prizes for Civil Procedure, Constitutional Law, and Corporations

Journals: *Stanford Law Review* (Vol. 76: Associate Managing Editor; Vol. 75: Member Editor); *Stanford Journal of Civil Rights and Civil Liberties* (Vol. 18: Member Editor)

Activities: Stanford Law Association Academic Affairs Committee (Co-Chair, 2022-23); Stanford Latinx Law Students Association; Prisoner Legal Services Pro Bono Project (2021-22)

Scholarship: *Secrecy by Stipulation: An Empirical Study of Stipulated Protective Orders in Federal and State Courts* (working paper) (with David Freeman Engstrom, Nora Freeman Engstrom, Jonah Gelbach, and Austin Peters)

Williams College, Williamstown, MA — B.A., *cum laude*, in Political Science, May 2018

Honors: Shirin Shakir Prize in Political Science (awarded for best essay in an International Relations Senior Seminar); Dean's List (all eligible semesters)

Activities: Varsity Crew (2014-18); Student Athlete Advisory Committee (Representative, 2016-17)

EXPERIENCE

WilmerHale LLP — Washington, DC
Summer Associate — *June – August 2023*

Stanford Law School — Stanford, CA
Teaching Assistant, Federal Litigation in a Global Context — *January – June 2023*
Supervised in-class research and peer-editing for Stanford's first-year legal research and writing course. Developed and delivered lectures on Bluebooking, style, and legal research. Guided students' drafts of simulated pre-trial briefs. Proofread and graded student submissions.
Research Assistant to Professors David Freeman Engstrom and Nora Freeman Engstrom — *January – June 2023*
Assisted in researching and drafting a series of forthcoming papers on the law and practice of protective orders and motions to seal in federal civil litigation. Catalogued and synthesized the doctrine of protective orders across the federal courts with particular focus on the treatment of stipulated protective orders.

United States District Court for the District of Columbia — Washington, DC
Intern to the Honorable Randolph D. Moss — *June – September 2022*
Drafted opinions and internal memoranda. Cite checked and Bluebooked opinions.
Intern to the Honorable Rosemary M. Collyer — *May – June 2016*
Conducted factual and legal research for Judge Collyer and her clerks.

Harkins Cunningham LLP — Washington, DC
Senior Legal Analyst — *June 2020 – July 2021*
Paralegal — *June 2018 – June 2020*
Supported senior partners in boutique infrastructure and railroad practice. Researched and drafted internal memoranda. Assisted in drafting briefs and expert reports in trial and appellate litigation. Assisted in negotiating and executing real estate transactions. Assisted in drafting filings in rate-making, common carriage, and antitrust disputes at the Surface Transportation Board.

National Foreign Trade Council — Washington, DC
Intern — *July – August 2017*
Tracked and analyzed domestic political developments relevant to members' international trade interests. Researched and drafted annual review of American trade policy. Composed and distributed the Council's weekly newsletters.

National Labor Relations Board — Washington, DC
Intern, Office of the Executive Secretary — *July – August 2016*
Researched and analyzed Board rulemakings and adjudications regarding employee handbooks. Synthesized these decisions in report designed for public release.

DEVIN P. FLYNN

566 Arguello Way, Apt. 103B, Stanford, CA 94305 | (240) 778-8800 | dflynn24@stanford.edu

RECOMMENDERS

Professor David Freeman Engstrom
LSVF Professor in Law
Stanford Law School
(650) 721-5859
dfengstrom@law.stanford.edu

Professor Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law
Stanford Law School
(650) 736-8721
ajosephoconnell@law.stanford.edu

Professor Sarath Sanga
William N. Cromwell Visiting Professor of Law
Harvard Law School
(617) 998-1896
ssanga@law.harvard.edu

REFERENCES

Ms. Shirin Bakhshay
Lecturer in Law, Stanford Law School
(415) 860-5937
bakhshay@law.stanford.edu
Ms. Bakhshay supervised my work as a Teaching Assistant at Stanford Law School.

Ms. Amanda Chuzi
Trial Attorney, United States Department of Justice
(571) 334-0663
amanda.chuzi@gmail.com
Ms. Chuzi was a Law Clerk to the Honorable Randolph D. Moss and supervised my work in chambers.

Mr. Paul A. Cunningham
Founding Partner, Harkins Cunningham LLP
(202) 415-4026
pac@harkinscunningham.com
Mr. Cunningham directly supervised my work at Harkins Cunningham LLP.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Flynn,Devin P
Student ID : 06451135

Print Date: 05/16/2023

--------- Academic Program ---------

Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

--------- Beginning of Academic Record ---------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	H	
Instructor:		Freeman Engstrom, David				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	205	CONTRACTS	5.00	5.00	H	
Instructor:		Sanga, Sarath				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	H	
Instructor:		Thesing, Alicia Ellen				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	240K	DISCUSSION (1L): REPRESENTATIONS OF CRIMINAL LAWYERS IN POPULAR CULTURE THROUGH THE LENS OF BIAS	1.00	1.00	MP	
Instructor:		Tyler, Ronald				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		O'Connell, Anne Margaret Joseph				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Fan, Mary D.				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	H	
Instructor:		Bakhshay, Shirin				
LAW	7507	LAW AND ECONOMICS SEMINAR II	2.00	2.00	MP	
Instructor:		Polinsky, A Mitchell Sanga, Sarath				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 29.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	H	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Bakhshay, Shirin				
LAW	1013	CORPORATIONS	4.00	4.00	H	
Instructor:		Sanga, Sarath				
Transcript Note:		Gerald Gunther Prize for Outstanding Performance				
LAW	7041	STATUTORY INTERPRETATION	3.00	3.00	H	
Instructor:		Snyder, Gregory Ryan				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 42.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	2404	GLOBAL LITIGATION	4.00	4.00	H	
Instructor:		Hensler, Deborah R				
LAW	2503	ENERGY LAW	3.00	3.00	H	
Instructor:		Weissman, Steven				
LAW	7036	LAW OF DEMOCRACY	3.00	3.00	P	
Instructor:		Persily, Nathaniel A.				
LAW	7836	ADVANCED LEGAL WRITING: APPELLATE LITIGATION	3.00	3.00	MP	
Instructor:		Makhzoumi, Katherine				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 55.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	1036	INTRODUCTION TO FINANCE	2.00	2.00	MP	
Instructor:		Daines, Robert				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	H	
Instructor:		Zambrano, Diego Alberto				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	H	
Instructor:		Freeman Engstrom, David				
LAW	7118	LEADERSHIP VACUUMS IN GOVERNMENT AND BUSINESS: LAW AND STRATEGY OF TEMPORARY LEADERS	2.00	2.00	H	
Instructor:		O'Connell, Anne Margaret Joseph				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Flynn,Devin P
Student ID : 06451135

LAW TERM UNTS: 11.00 LAW CUM UNTS: 66.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	3.00	0.00		
Instructor:		Freeman Engstrom, David				
LAW	1001	ANTITRUST	4.00	0.00		
Instructor:		Van Schewick, Barbara				
LAW	7010A	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	0.00		
Instructor:		Karlan, Pamela S				
LAW	7117	PLATFORM REGULATION AND THE FIRST AMENDMENT	2.00	0.00		
Instructor:		Douek, Evelyn				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 66.00

END OF TRANSCRIPT

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723-4455
Fax 650 723-4669
jmartinez@law.stanford.edu

Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

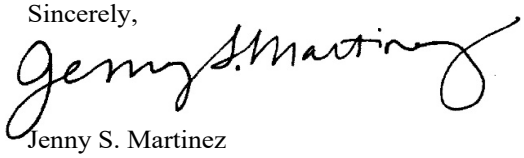
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

June 03, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Subject: Letter of Recommendation for Devin Flynn

Dear Judge Walker:

Devin was the strongest student I encountered during my year at Stanford Law School. He has my highest possible recommendation. I would encourage you to hire Devin as soon as possible. He will be a superb clerk.

Here are three specific reasons why I am so confident in Devin's abilities.

1. Devin took two black letter classes with me: Corporations and Contracts. He wrote the best exam in Corporations and one of the top three exams in Contracts. Both exams were anonymously graded. His performance in Corporations is especially impressive. That course is typically dominated by 2Ls and 3Ls—yet Devin topped it as a 1L. This past year at Harvard, I used Devin's exams as "model answers."

2. Devin also took my Law and Economics seminar, in which outside speakers come and present original research papers. One such paper concerned the use of prison labor. It was a fraught session. The speaker wanted to make an economic point. The students, talking past the speaker, focused on the historical and dignitary points. It was a lively discussion, yet it wasn't going anywhere. But then here comes Devin with a series of comments integrating the speaker's (valid) economic points with the students' (equally valid) counters. As so often happened in the seminar, Devin's points were both illuminating and constructive.

   Here's what I took away from that and many other such memorable moments with Devin: Devin is like a great musician in that he listens. I mean really listens. This enables him to take in ideas, perhaps even conflicting ones, to synthesize them, and then to communicate his own take at the right time.

3. Devin has the perfect temperament for a clerk: mature, thoughtful, and extremely thorough. These qualities make Devin uniquely well-suited for the intimate and demanding setting of chambers.

Please do not hesitate to call me to discuss anything about Devin's candidacy. My cell is (818) 519-9348. For email, please use my personal email address: sarathsanga@gmail.com.

Sincerely,

/s/ Sarath Sanga

William Nelson Cromwell Visiting Professor of Law (2022-2023)
Harvard Law School

Professor of Law
Yale Law School (beginning July 2023)

Professor of Law
Northwestern Pritzker School of Law

Associate Professor of Strategy (by courtesy)
Northwestern Kellogg School of Management

Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, California 94305-8610
ajosephoconnell@law.stanford.edu
650 736.8721

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write, with exceptional enthusiasm, to recommend Devin Flynn—an academic star of the class of 2024 with three prizes in major courses (including my Constitutional Law class) and only three Pass grades—for a clerkship in your chambers. He also served as a teaching assistant for the required first-year writing course (a testament to his legal writing) and is one of the new managing editors of the Stanford Law Review. The son of an Irish-American father and Puerto Rican mother, Devin is scarily smart without being scary, impressively detail oriented yet intellectually creative, and delightfully engaging with exceptional gentleness. I urge you to interview him.

I first met Devin in January 2022 when he was assigned to my Constitutional Law section, along with sixty-one other students. The nine-week mandatory class for first-year students covers the powers of and limits on the federal courts, Congress, and the President, as well as the powers of and limits on the states. It is not an easy class. In addition to the final examination, I require students during the quarter to write one response paper (on their own or with up to two partners) and to make an (ungraded) oral presentation tied to recent district court litigation. Combining his response paper and final examination, Devon ranked first in my Constitutional Law class, earning an Honors grade and a prize.

Writing with a classmate, Devin penned one of the best response papers that quarter, which I now use as a model for other students. They analyzed how the primary methods of interpretation (textualism, intratextualism/structuralism, originalism, pragmatism/living constitutionalism, and precedentialism) featured in McCulloch v. Maryland and decided which methods provided the most compelling justification for the Court's decision. The essay started: "In McCulloch v. Maryland, Chief Justice Marshall draws on each interpretive mode we have discussed. Most convincing among these are his deployment of: (1) intratextualism to frame the Necessary and Proper Clause as a broad grant of implied power; and (2) pragmatism to justify expansive implied powers and assert the supremacy of the federal government over the States." The paper shined on analysis, organization, and prose. What made it special was the impressive use of relevant class material outside the specific case in the prompt.

In the primary evaluative tool in my class, a timed and difficult take-home examination, Devin had no peers, submitting the top set of answers. He excelled on the two thorny issue spotters: one on the federal regulation of intrastate waters that provide a habitat for migratory birds and endangered species (focusing on Congress's power and limits) and one on proposed revisions to the selection and removal of inspectors general (focusing on separation of powers and the Appointments Clause). Both issue spotters also had difficult justiciability components, although they were not challenging to Devin. His answer to a broader-ranging question —specifically, on how New York's Council on Revision (in its 1777 Constitution) and the current U.S. Constitution relate, including their connections and gaps, doctrinally and normatively—was exquisite. I distributed large chunks of his exam in my packet of model student answers.

For the oral "argument," assigning students the district court materials in Missouri v. Biden, I had Devin represent the United States, arguing that Missouri lacked standing to challenge the Biden Administration's COVID-19 vaccine mandates for federal contractors. In a strong presentation, he focused on why the state's harm was speculative and not sufficiently connected to the government's action. He was deeply prepared for my panels throughout the quarter, answering a range of questions. He addressed methods (textualism in Heller), doctrine (Commerce Clause arguments in Schechter Poultry and Spending Clause arguments in NFIB), and policy considerations (on delegation and the legislative veto).

I was excited to have Devin in my winter quarter seminar this year on temporary leadership in government and business, which covered acting agency leaders under the Federal Vacancies Reform Act (Vacancies Act), delegations of authority, interim CEOs, court-appointed custodial corporate officers, and boomerang CEOs, among other topics. Drawing on legal materials, social science research, business studies, historical examples, and guest speakers, it explored the causes and consequences of temporary leaders as well as the constraints under which they operate, how such leaders could be more effective, and how interim officials can become more permanent leaders. Although only two credits, students had to complete two response papers during the quarter, participate actively in class, and draft a final paper. Devin's performance was outstanding on all dimensions, earning one of the few Honors grades for the class. As with his work in Constitutional Law, I asked him to use his second response paper and final paper as models for future students.

For the first response paper, Devin examined a provision of the Vacancies Act that allows the President to choose a Senate-confirmed official at any agency to serve as an acting leader in a vacant Senate-confirmed position. (President Trump relied on this provision to install Mick Mulvaney, OMB Director, as acting head of the Consumer Financial Protection Bureau late in his first year). Devin was not a fan: "Cross-departmental designations strike me as (1) in tension with the Appointments Clause and (2) inconsistent with the policy rationale for allowing acting officials." Among many interesting points, his arguments about germaneness for the first point and about governance (holding jobs at different agencies) about the second were particularly compelling. Even though Devin had a particular view on the provision, his essay was nuanced; it deftly and genuinely considered counterarguments.

In his second paper, Devin reflected on whether we can measure leaders' performance accurately. Here, too, Devin was skeptical. He called it "a Sisyphean task—at least for outside observers." He made three observations: "(1) A leader's performance is inextricably linked with her mandate. (2) Objective measurement of leadership in governmental organizations is particularly difficult. (3) Even leadership in sports, nominally most suited to objective assessment, confounds accurate measurement." Drawing impressively from class reading and discussion, the phenomenal essay combined his impressive knowledge about government and business and his exceptional knowledge and passion about sports.

For his final paper, Devin took up an offhand comment I made in class—about whether the Vacancies Act permits the President to use Senate-confirmed officials in independent regulatory commissions and boards (such as the Federal Communications Commission or National Labor Relations Board) as acting officials in executive agencies and cabinet departments. No President has done this, but you could imagine a party change in the White House where the Senate remains in control of the outgoing party (and refuses to confirm the new President's agency nominees). Because of party-balancing mandates in many commissions and boards, the White House would have some Senate-confirmed appointees from its party to pull from.

Devin's stellar paper examined "two possible arguments—one statutory and one constitutional—that could prevent the hypothetical …. First, I consider whether FVRA makes IRC commissioners statutorily ineligible to serve as acting officers. Second, I assess whether the doctrine of 'germaneness' might prevent IRC commissioners from serving as acting officers in non-independent agencies. I conclude neither argument is likely to succeed." No other final paper in the seminar topped it (and another student's final paper).

The class had only ten students, so it depended heavily on participation. I was thrilled every time Devin raised his hand. His careful contributions always moved the discussion forward in important ways. Devin does not dominate conversation; he listens and reflects before interjecting.

In sum, I am a great fan of Devin. A former college varsity rower, he knows how to work hard and well with others. If I were a judge, I would want him as my clerk. If you should need any additional information, please contact me at (415) 710-8475 (cell) or at ajosephoconnell@law.stanford.edu. I would be delighted to talk more about him.

Sincerely,

Anne Joseph O'Connell
Adelbert H. Sweet Professor of Law
Law Clerk, Judge Stephen F. Williams
Law Clerk, Justice Ruth Bader Ginsburg

David Freeman Engstrom
LSVF Professor in Law
Co-Director, Deborah L. Rhode Center on the Legal Profession
559 Nathan Abbott Way
Stanford, California 94305-8610
650-721-5859
dfengstrom@law.stanford.edu

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

All my work with Devin Flynn at Stanford Law—as my Civil Procedure and Administrative Law student, and as part of a research team on a large, litigation-focused project—have revealed him to be a legal juggernaut with razor-sharp doctrinal abilities and an impressive litigator's bent. I hope you hire him.

Devin, the student, was something to behold. From day one in Civil Procedure, he sat in the same seat—second-row center—and was the single best prepared and most active (but never showy) class participant. His exam was among the very best in a class of 60, thus earning him an "Honors" grade, reserved for the top one-third of students in a course, and also a "book prize," reserved for the very top performers (no more than one per fifteen students). His answers to the portion of the exam that focused on personal and subject-matter jurisdiction were simply stunning—perhaps the result, I later learned, of a set of ingenious clarifying diagrams and flowcharts he had developed, which much of the class had used to study in the run-up to the exam.

Devin's performance in Administrative Law was more of the same: a constant source of smart and spot-on class contributions, and always game to contribute to class discussions no matter the issue. This time, Devin's exam fell just below a book prize in a talented class of nearly 100 students, but it still displayed impressive command of the dense, heavily doctrinal material and earned him a strong Honors grade. As in Civil Procedure, Devin revealed himself to be a lawyer's lawyer: razor-sharp, succinct, to the point, and able to see the strategic landscape of litigation.

All of this is a threshold requirement for a clerkship in your chambers. What sets Devin apart, to my mind, is the truly remarkable work he has done as a member of the research team for a large project in collaboration with my Stanford colleague (and better half) Nora Freeman Engstrom and Berkeley Law's Jonah Gelbach. By way of background, the project focuses on issues of litigation secrecy and transparency that have roared onto the political and legal radar in recent years as a result of #MeToo and various mass torts cases. We have assembled a ten-person research team made up of lawyers, political scientists, and machine learning experts and built two of the largest civil justice datasets ever assembled, one federal and one state. We will soon start delivering papers testing key claims about secret settlements and NDAs, protective orders, and motions to seal.

Devin's role on the project has been multi-faceted. He has performed literature reviews and helped hone hypotheses. He has coded large numbers of docket entries and trial court orders to train machine learning models. But Devin's largest contribution has been to write a truly extraordinary and ever-growing memo that sizes up the entire federal judiciary's approach to protective orders and motions to seal. What Devin managed to produce in only a few months' time (and in between his many obligations as a student and law review officer) is something like a publishable treatise. It effortlessly synthesizes an enormous amount of doctrine, categorizing every circuit court's approach, showing where and how district courts depart from the articulated appellate standards, and setting forth flowcharts and diagrams summarizing what are surprisingly different approaches across jurisdictions. Devin has such an impressive and encyclopedic command that the team has taken to calling him "Flynn on Protective Orders," an homage to "Wigmore on Evidence," the famous treatise.

Devin's juggernaut legal-analytic abilities have been evident during the rest of his time at Stanford, and a brief comment is in order to place his extraordinary academic record in context. Across his first two years at Stanford, Devin has earned 14 "Honors" grades as against only three "Pass" grades. Just as important, Devin has notched three "book prizes" (including in my Civil Procedure course). To provide some perspective on this record of achievement, it is worth recognizing that Stanford's grading system is notable for its rigor. Unlike some of our peer schools, which place no upper limit on the number of students who can earn an Honors grade in a course, Stanford strictly limits the proportion who can do so. At certain other schools, it is common for a non-trivial number of students to earn all Honors grades across all three years of law school. At Stanford, by contrast, it is not unusual for every student in the 1L class to emerge from the first year with at least one Pass grade, and even earning three-quarters Honors grades—a threshold that Devin easily exceeds—is typically enough to place a student in the top 10 percent of the class. While Stanford does not do strict rankings, Devin's transcript thus far likely places him in the top dozen or so students in the entire Class of 2024.

Finally, it is important to note that Devin manages to do all of this with a professional but personable and even light-hearted touch. He's very much a grown-up, and there's no question that he'll be a well-liked and friction-free part of chambers.

In short, Devin is a unique talent and an extraordinary litigator in the making. I urge you to hire him. If I can supply further

information, feel free to call me. My office number is above and my cell phone number is 650-739-5851.

Sincerely,

/s/ David Freeman Engstrom

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WRITING SAMPLE

The attached writing sample is an essay I composed as the final assignment for a seminar entitled *Leadership Vacuums in Government and Business: Law and Strategy of Temporary Leaders*. The assignment required drafting an essay on any topic connected to assigned reading or class discussion. My essay analyzes the interaction between the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d, and independent regulatory commissions. I assess whether officers in independent regulatory commissions may be designated to serve as acting officers in other executive agencies. Specifically, I evaluate two potential challenges—one statutory and one constitutional—to such designations. I independently researched, wrote, and edited this essay.

Acting Independence:

Independent Regulatory Commissions and the Federal Vacancies Reform Act

Devin Flynn

Leadership Vacuums in Government and Business

Professor O'Connell

Winter 2023

April 10, 2023

Introduction

The year is 2025. An icy January wind leaves the throngs gathered on the National Mall shivering as newly-elected President Ron DeSantis delivers his inaugural address. But the Senate—looming behind DeSantis' pulpit—is positively frozen. With Democrats narrowly controlling the upper chamber, Majority Leader Schumer has vowed not to confirm a single DeSantis-nominee until the White House and Speaker McCarthy accede to his budgetary demands. Unwilling to accept Schumer's terms, DeSantis is faced with the daunting prospect of governing without a Senate-confirmed Cabinet.[1]

The Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d ("FVRA"), offers a safety valve to relieve the pressure of this intensifying constitutional crisis.[2] The Constitution requires that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States."[3] But Congress has long recognized the risk that the duties of offices requiring Presidential appointment and Senate confirmation—"PAS" offices—may go unperformed if the President and Senate are unable, or unwilling, to promptly nominate and confirm PAS officers.[4] FVRA is Congress' latest attempt to cut through this Gordian knot.

Should a vacancy arise in a covered PAS office,[5] § 3345(a) of FVRA permits three categories of officials to perform the functions of the covered office in an acting capacity.[6]

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[1] This extended hypothetical draws from our class discussion. But the analogy holds for any presidential succession involving a change of party and a Senate controlled by the opposition.

[2] *See* Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 211 (D.C. Cir. 1998) ("The function of the [FVRA] is to allow some breathing room in the constitutional system . . . .").

[3] U.S. CONST. art. II, § 2, cl. 2.

[4] *See* NLRB v. SW Gen., Inc., 580 U.S. 288, 293–95 (2017) (recounting the history of Congress' attempts to address this issue beginning with "President Washington's first term").

[5] FVRA's designation provisions do not apply to vacancies in multi-member "independent establishment[s] or Government corporation[s]," the Federal Energy Regulatory Commission, the Surface Transportation Board, or Article I courts. 5 U.S.C. § 3349c. Nor do they apply to the Government Accountability Office. *Id.* § 3345(a).

[6] *Id.*

Subsection (a)(1) sets the default rule: The "first assistant" to the vacant office "shall perform" the "functions and duties of the office temporarily in an acting capacity."[7] But President DeSantis will find this option unavailing.[8] With the Senate gridlocked, there are no deputy secretaries of his choosing to perform the functions of their superiors.[9]

Fortunately for DeSantis, the next two paragraphs of § 3345(a) identify alternatives. Subsection (a)(3) provides that "the President (and only the President) may direct an officer or employee" who has not been Senate-confirmed to "perform the functions and duties of the vacant office temporarily in acting capacity" provided they have worked in the agency at a GS-15 pay-level or higher for at least ninety days in the year-long period preceding the vacancy.[10] Again, President DeSantis is unsatisfied. None of his newly-minted non-PAS inferior officers satisfy the temporal requirement. And he harbors ideological suspicions toward the class of career civil servants who would otherwise qualify under this provision.

This leaves § 3345(a)(2) as DeSantis' only viable option. That subsection provides that "the President (and only the President) may direct a person who [is a confirmed PAS officer] to perform the functions and duties of the vacant office temporarily in an acting capacity."[11] Crucially, on the face of the statute, § 3345(a)(2) allows the President to direct *any* Senate-

[7] *Id.* § 3345(a)(1).

[8] *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 629 (2020) (noting that "[d]uring the early days of administrations, when there are few first assistants and confirmed officials, Presidents" look to other provisions of FVRA for acting officials).

[9] Although "first assistant" is "a term of art under" FVRA, it "is not defined by the Act and its meaning is somewhat ambiguous." VALERIE C. BRANNON, CONG. RSCH. SERV., R44997, THE VACANCIES ACT: A LEGAL OVERVIEW 10 (2018), https://fas.org/sgp/crs/misc/R44997.pdf. Opinions on the term's precise meaning vary. *Id.* at 10–11 (describing some contours of the debate). But deputy secretaries are prototypical first assistants. *See* O'Connell, *supra* note 8, at 629 ("[I]f there is no confirmed or recess-appointed secretary of commerce, the confirmed or recess-appointed deputy secretary of commerce, as the first assistant, typically becomes the acting secretary."). Assume for present purposes that all first assistants to PAS officers appointed by President Biden have resigned.

[10] 5 U.S.C. § 3345(a)(3).

[11] *Id.* § 3345(a)(2).

confirmed officer to serve as an acting officer. Nothing in the text limits the President's selection to PAS officers within the agency now facing a vacancy—though "officials drawn from this category typically served in the same agency previously."[12]

But which confirmed PAS officers can DeSantis designate to serve as acting officers? The Senate has refused to confirm his nominees to any post. And DeSantis will not turn to whatever PAS holdovers remain from the Biden administration. Enter the independent agency.

The precise meaning of "independent agency" is the subject of enduring and heated debate.[13] And the form and features of agencies considered independent vary.[14] The scholarly consensus "is that the dividing line [between independent agencies and others] is the presence of a for-cause removal protection clause, but not all agencies considered independent possess such a clause."[15] Several other characteristics—multimember structure; specified tenure; bipartisanship requirements; rulemaking, adjudicatory, and enforcement authority; and a narrow mandate—have also been categorized as indicia of agency independence.[16] For present purposes, I limit my discussion to certain independent regulatory commissions ("IRCs"), like the Federal Communications Commission, defined as "independent regulatory agenc[ies]" in the Paperwork Reduction Act of 1980, 44 U.S.C. § 3502(5).[17]

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[12] O'Connell, *supra* note 8, at 629.

[13] *See generally* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) (arguing independent agencies are more the product of unwritten norms and conventions than of law); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (arguing agencies fall on a continuum of independence such that so-called independent agencies are different from other agencies in degree rather than kind and not entitled to any special constitutional status).

[14] *See* Datla & Revesz, *supra* note 13, at 784–812 (cataloging the presence and absence of various structural features associated with agency independence in those governmental bodies often considered independent agencies); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51 ("It is not entirely clear exactly what features of the independent regulatory commissions are essential and what are merely incidental.").

[15] Datla & Revesz, *supra* note 13, at 776 & n.24 (collecting literature to this effect).

[16] *Id.* at 782 (surveying other attempts to define independent agencies).

[17] The definition does not assign a particular meaning to the term "independent regulatory agency" but rather provides a list of agencies deemed independent for the purposes of Paperwork Reduction Act followed by the

For President DeSantis, the IRCs possess three critical features. First, their commissioners serve for specified terms.[18] Second, their organic statutes (often) require bipartisan representation.[19] And third, they are composed of PAS officers.[20] Thus, despite inheriting a Biden-staffed government and recalcitrant Senate, DeSantis can turn to the IRCs for a roster of existing PAS officers with credible partisan bona fides. Section 3345(a)(2) of FVRA springs to life, and DeSantis directs FCC Commissioner Nathan Simington—a 2020 Trump-appointee now in the last year of his five-year term—"to perform the functions and duties" of the office of Secretary of State.[21] Because FVRA contains no express limitation on the number of positions whose functions and duties a PAS officer may perform by designation,[22] DeSantis directs Simington to perform the functions of *every* cabinet-level position.[23] Once designated, Simington is largely free to perform all of his new functions "without any limitation on [his] formal authority"[24] and to delegate many of his responsibilities to subordinates.[25]

In sum, without Senate-confirmation of a single nominee, President DeSantis can use FVRA and the IRCs to staff his government. This would be an unprecedented encroachment of

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catchall phrase "and any other similar agency designated by statute as a Federal independent regulatory agency or commission." 44 U.S.C. § 3502(5).

[18] *E.g.*, 47 U.S.C. § 154(c)(1)(A) (providing a five-year term for FCC commissioners).

[19] *E.g.*, *id.* § 154(b)(5) (limiting the number of FCC commissioners who may be "members of the same political party").

[20] *E.g.*, *id.* § 154(a) (providing that the FCC "shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate").

[21] 5 U.S.C. § 3345(a)(2).

[22] *See* O'Connell, *supra* note 8, at 680 ("[FVRA] do[es] not expressly include a ban on someone having two acting titles."). The Office of Legal Counsel reads FVRA to bar an acting official currently performing the functions of a vacant first assistant from assuming the functions of a vacant principal officer by operation of § 3345(a)(1). *Id.* at 679–80. But the rationales for this interpretation are cabined to § 3345(a)(1) and provide no broadly applicable limitation. *See* Designating an Acting Dir. of Nat'l Intel., 43 Op. O.L.C., slip op. at 6–10 (Nov. 15, 2019).

[23] Certain agency-specific succession statutes may preempt FVRA and prevent this outcome, but the few courts to address the issue have found FVRA remains a viable option even where an agency's organic statute provides a succession plan using mandatory language. *See* O'Connell, *supra* note 8, at 667–71.

[24] *Id.* at 627.

[25] BRANNON, *supra* note 9, at 25–29 (discussing the delegability of duties).

the Senate's Article II advice-and-consent power—a critical "structural safeguard[] of the constitutional scheme."[26] While this stylized instance of constitutional hardball is exaggerated, it illustrates the stakes of an understudied corner of vacancies scholarship.[27] My research returned no dedicated review of the interaction between FVRA and IRCs. But as Senate confirmations grow more politically contentious, the gamesmanship I described lurks as an interbranch Chekhov's gun—waiting for the right President and the right Senate to trigger its operation.

Because the use of FVRA to direct IRC commissioners to perform the functions and duties of PAS officers remains (for now) hypothetical, no caselaw directly addresses the issue. In the following Parts, I assess two possible arguments—one statutory and one constitutional—that would prevent the hypothetical I described. First, I consider whether FVRA makes IRC commissioners statutorily ineligible to serve as acting officers. Second, I assess whether the doctrine of "germaneness" might prevent IRC commissioners from serving as acting officers in non-independent agencies. I conclude neither argument is likely to succeed.

These are not, by any means, the only possible challenges to the FVRA scheme. Justice Thomas has suggested the designation of acting principal officers under FVRA "raises grave constitutional concerns."[28] And some scholars have argued FVRA's limits on acting service tenure are "simply too long and, thus, in violation of the Appointments Clause."[29] But I endeavor here to treat arguments limited to IRCs and the § 3345(a)(2) context. It bears emphasis that

[26] Edmond v. United States, 520 U.S. 651, 659 (1997).

[27] However exaggerated this hypothetical, interagency designations under § 3345(a)(2) have been the subject of intense popular and legal scrutiny of late. *See* O'Connell, *supra* note 8, at 618–19, 667–70 (detailing the controversy and litigation surrounding President Trump's designation of Mick Mulvaney—the Senate-confirmed Director of the Office of Management and Budget—as the acting Director of the Consumer Financial Protection Bureau).

[28] NLRB v. SW Gen., Inc., 580 U.S. 288, 313 (2017) (Thomas, J., concurring).

[29] Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 601 (2020). *But cf.* Rop v. Fed. Hous. Fin. Agency, 50 F.4th 562, 571–74 (6th Cir. 2020) (rejecting a similar argument in the context of an agency-specific acting succession statute).

FVRA's facilitation of acting designations vindicates the public interest in the stability and continuity of the federal government. The baby and the bathwater must be studiously separated.

I. Statutory Ineligibility: Are IRC Commissioners in Play at All?

In the spirit of constitutional avoidance, I begin with an issue of statutory interpretation.[30] Does FVRA allow the President to direct IRC commissioners to perform the functions and duties of other offices? The question appears to be one of first impression. Because vacancies *in* IRCs are indisputably beyond FVRA's scope,[31] IRC commissioners can generally only be directed to serve as acting officers in positions outside the agencies to which they were appointed.[32] But interagency designation of any PAS officer under § 3345(a)(2) is rare.[33] And I could not find any instances of interagency designation of IRC commissioners to date.[34]

Recognizing this novelty, "[w]e start, of course, with the statutory text."[35] FVRA's operation is triggered when "an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office."[36] In similar language, § 3345(a)(2) enables the President to "direct a person who serves in an office for

[30] *See* United States v. Davis, 139 S. Ct. 2319, 2332 n.6 (2019).

[31] 5 U.S.C. § 3349c.

[32] Some PAS positions in IRCs below the commission-level are expressly included in FVRA. For example, FVRA applies to the General Counsel of the National Labor Relations Board but not to NLRB members. *Id.* § 3348(e)(1). But, for obvious reasons, IRC commissioners are unlikely candidates to fill the shoes of their own subordinates.

[33] O'Connell, *supra* note 8, at 629 (noting acting officials typically serve in the agency in which they already work).

[34] Even if there are isolated instances of interagency designation of IRC commissioners, the Court has rejected the contention that "post-enactment practice" under FVRA is entitled to deference as "historical practice." NLRB v. SW General, Inc., 580 U.S. 288, 307–08 (2017) (rejecting as insubstantial 112 instances of a particular practice).

[35] BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006).

[36] 5 U.S.C. § 3345(a).

which appointment is required to be made by the President, by and with the advice and consent of the Senate," to perform the functions of a vacant PAS office.[37]

Thus, the triggering and enabling provisions of § 3345 reveal two key features. First, they contain no explicit limitation on which PAS officers may be directed to fill a PAS vacancy. And second, FVRA uses substantially identical language to describe both the PAS officers whose vacancies it covers and the PAS officers who may be directed to fill those vacancies.

We turn then to § 3349c, titled "Exclusion of Certain Officers," which provides that:

> Sections 3345 through 3349b shall not apply to—
>
> (1) any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—
>
> (A) is composed of multiple members; and
>
> (B) governs an independent establishment or Government corporation . . . .[38]

Section 3349c then specifically excludes members of the Federal Energy Regulatory Commission and Surface Transportation Board and PAS judges in Article I courts.[39]

Assuming for present purposes that IRCs fall into this exclusion,[40] § 3349c raises a critical statutory ambiguity. Are IRC commissioners excluded only from the triggering provision—that is, does § 3349c provide narrowly that vacancies in IRCs are not fillable by operation of § 3345? Or are IRC commissioners excluded from *all* FVRA provisions—that is, does § 3349c also provide that IRC commissioners cannot serve as acting officers under § 3345(a)(2)? Both readings are plausible, but the former is more likely to find judicial support.

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[37] *Id.* § 3345(a)(2).

[38] *Id.* § 3349c.

[39] *Id.* § 3349c(2)–(4).

[40] *But see supra* notes 13–17 and accompanying text (describing ambiguity on this point). The explicit exclusion of FERC and the STB raises interesting questions about the meaning of the general definition in § 3349c(1).

Proponents of the more expansive reading will point to § 3349c's broad language. Nothing in its text limits the exclusion of IRCs to the vacancy trigger alone; it states that § 3345 as a whole "shall not apply" to excluded IRCs.[41] On its face then, § 3349c logically excludes IRC commissioners from § 3345(a)(2)'s enabling provision. Had Congress intended to limit § 3349c's exclusion, it could have done so explicitly with language like "Sections 3345 through 3349b shall not apply *to vacancies in*" relevant offices. And Section 3349c's description of excluded officers is essentially identical to the language used in § 3345(a)(2) to describe those officers who can serve as acting officers by designation.[42] This similarity might suggest that those covered by the former must also be excluded from the latter.

But there are a number of persuasive counterarguments. First, the similarities in the language across the provisions are limited to the description of PAS procedure. That Congress used the same language to describe the same procedure is not itself remarkable. And the language of the § 3345(a)(2) enabling provision differs from the § 3345(a) trigger and § 3349c exclusion in one critical respect. Section 3345(a)(2) refers to "*a person* who serves in an office for which" PAS procedure is required.[43] But both the triggering and exclusion provisions refer not to a *person* but to an *office*.[44] So too do the other § 3345(a) enabling provisions.[45] Thus, the argument goes, when Congress employed official language in § 3349c, it excluded officers only from those provisions that use similarly official language and not from § 3345(a)(2).

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[41] 5 U.S.C. § 3349c.

[42] *Compare id.* (describing "any member who is appointed by the President, by and with the advice and consent of the Senate"), *with id.* § 3345(a)(2) (describing "a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate").

[43] *Id.* § 3345(a)(2) (emphasis added).

[44] *Id.* § 3345(a) ("If *an officer* of an Executive agency . . . ." (emphasis added)); *id.* § 3349c (referring to "any *member* . . . any *commissioner* . . . [or] any *judge*" (emphasis added)).

[45] *Id.* § 3345(a)(1) (referring to "the first assistant"); *id.* § 3345(a)(2) (referring to "an officer or employee").

Second, § 3349c states that FVRA "shall not apply *to*" certain excluded officers.[46] Perhaps § 3349c only excludes IRC commissioners from those provisions of § 3345 which apply *to officers*, not those provisions which merely implicate them. And while the § 3345(a) trigger does apply to officers,[47] § 3345(a)(2)'s enabling provision applies *to the President*: "[T]he President (and only the President) may direct a person" who serves in a PAS office to perform acting duties.[48] Thus, § 3349c's exclusion has no effect on § 3345(a)(2).

Proponents of the broader view of § 3349c will argue this distinction leads to structural inconsistencies. Section 3349, which imposes reporting requirements on agencies, also applies *to officers*,[49] but it explicitly imposes its obligations on the heads of agencies listed in § 3349c.[50] Section 3349c's general language cannot be read to exempt IRC commissioners from provisions that apply to them when another, more specific, provision applies to them on its face.

But any tension between §§ 3349c and 3349 subsides if one reads § 3349c as merely stating that the other provisions of FVRA shall not apply to *vacancies in* IRCs. That construction explains why § 3349 can still impose reporting requirements on existing IRC commissioners. And it has the added benefit of conforming with the legislative history.[51] The Senate Committee on Governmental Affairs' report accompanying FVRA states explicitly, and narrowly, that "vacancies in the[] positions [described in § 3349c] are not covered by this legislation."[52] Perhaps Congress could or should have used language to that effect. But it had a compelling reason for brevity: Congress viewed § 3349c as merely restating an existing exclusion on

[46] 5 U.S.C. § 3349c (emphasis added).
[47] *Id.* § 3345(a) ("If an officer of an Executive agency . . . .").
[48] *Id.* § 3345(a)(2).
[49] *Id.* § 3349(a) ("The head of each Executive agency . . . shall submit [certain reports] . . . .").
[50] *Id.* § 3349(a)(1) (requiring "notification of a vacancy in an office" to which § "3349c" applies).
[51] *See* S. REP. NO. 105-250, at 22 (1998).
[52] *Id.*

unilateral presidential filling of vacancies in independent agencies.[53] And the Office of Legal Counsel's first and contemporaneous interpretation of FVRA lends further support to this view. Shortly after FVRA's passage, OLC opined that FVRA "does not impose any limitations on which PAS officers the President may designate" to serve in an acting capacity elsewhere.[54]

In sum, while there is a plausible argument that FVRA prevents the President from designating IRC commissioners to serve as acting officers, it seems unlikely to prevail.[55]

II. Germaneness: A Constitutional Limit on Section 3345(a)(2)?

Because FVRA facilitates the exercise of the functions and duties of PAS officers—including principal officers—without the Senate's advice and consent, some have suggested it violates the Appointments Clause.[56] One common response is that FVRA designations "do not involve the exercise of any constitutional appointment authority" at all.[57] Rather, the duties an acting officer assumes upon designation are merely "contingent powers appended to the[ir] original office."[58] And while the President may trigger this contingency at her discretion under § 3345(a)(2),[59] Congress has already baked any new powers into the officer's initial PAS post.[60]

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[53] *Id.* ("The Committee believes that this has always been the case with the [sic] respect to the Vacancies Act and wishes to avoid any confusion that might result from the enactment of a replacement statute on this point.").

[54] Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 65 (1999). But note that OLC has since repudiated other elements of this "tentative[]," "initial understanding" of FVRA as "erroneous." Designation of Acting Assoc. Att'y Gen., 25 Op. O.L.C. 177, 179 (2001).

[55] For alternative statutory arguments, litigants might look to the organic statutes of the IRCs, which often limit the work commissioners can do beyond their IRC. *E.g.*, 47 U.S.C. § 154(b)(4) ("Members of the [FCC] shall not engage in any other business, vocation, profession, or employment while serving as members.").

[56] *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 313 (2017) (Thomas, J., concurring) (suggesting the designation of acting principal officers under FVRA "raises grave constitutional concerns").

[57] Michael B. Rappaport, *The Original Meaning of Recess Appointments*, 52 UCLA L. REV. 1487, 1514 (2005) (suggesting that, "if [designations of acting principal officers] were appointments, they would be unconstitutional").

[58] E. Garrett West, Note, *Congressional Power over Office Creation*, 128 Yale L.J. 166, 219 (2018); *accord* Designation of Acting Dir. of the Off. of Mgmt. & Budget, 27 Op. O.L.C. 121, 122 n.3 (2003) ("[A]ny duties arising under [FVRA] can be regarded as part and parcel of the office to which he was appointed.").

[59] 5 U.S.C. § 3345(a)(2) ("[T]he President (and only the President) may direct . . . .").

[60] *See* Rappaport, *supra* note 57, at 1515 & n.78 (suggesting this is a valid exercise of Congress' powers under the Necessary and Proper Clause).

Weiss v. United States, a 1994 Supreme Court decision holding a statute similar to FVRA did not violate the Appointments Clause,[61] lends support to this view while also opening a new line of attack on designations of IRC commissioners under § 3345(a)(2). *Weiss* concerned a statute that allowed the Judge Advocate General of each military branch to "detail" or "assign" commissioned officers to be military trial judges for a limited time.[62] Because commissioned officers are PAS, the Court considered whether the Appointments Clause "require[d] a second appointment before military officers [could] discharge the duties of such a judge."[63]

The Court rested its analysis in part on *Shoemaker v. United States*, an 1893 Supreme Court decision holding Congress could grant PAS officers new duties without requiring a second PAS appointment where such duties were "germane to the offices already held by them."[64] Applying this "principle of 'germaneness,'" the *Weiss* Court concluded "the role of military judge is 'germane' to that of military officer" and that no second appointment was required.[65]

"Like the statute in *Weiss*," FVRA empowers "someone (in this case the president) to temporarily grant the duties of a new office to a person who has already received Senate confirmation to another office."[66] And *Weiss*' germaneness inquiry may thus inform an Appointments Clause challenge to the designation of IRC commissioners under FVRA.[67]

How then do IRC commissioners directed to assume the duties of officers in non-independent agencies fare under the germaneness analysis? An accurate answer will of course

[61] 510 U.S. 163 (1994).

[62] *Id.* at 172.

[63] *Id.* at 176.

[64] 147 U.S. 282, 301 (1893).

[65] *Weiss*, 510 U.S. at 174–76.

[66] Thomas A. Berry, S.W. General*: The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 179.

[67] *Id.*; *cf. In re* al-Nashiri, 791 F.3d 71, 85 (D.C. Cir. 2015) (asking, but not answering, whether germaneness might "cure any Appointments Clause question with an inferior-to-principal assignment" in a different context (emphasis omitted)).

depend on the particular IRC and the particular designation. *Weiss*' assessment of germaneness was scrupulously context-dependent.[68] But three high-level considerations seem likely to inform any germaneness analysis: the officer's (1) subject-matter expertise; (2) management expertise; and (3) accountability to the President.

First, a court would likely consider the extent to which the IRC commissioner—by virtue of their work in that post—is experienced and knowledgeable in the subject-matter of the functions and duties they are directed to undertake under § 3345(a)(2). For example, the duties of the Director of the Consumer Financial Protection Bureau may be more germane to a member of the Federal Trade Commission than those of the Secretary of Defense. And the narrow mandates of many IRCs may provide a compelling basis for a challenge on these grounds. But for litigants seeking to prevent the designation of IRC commissioners, a focus on this consideration may prove too much. If subject-matter expertise is dispositive, then the germaneness analysis would preclude a host of interagency designations that don't involve IRC commissioners at all.[69] This could be an undesirable outcome on policy grounds and would conflict with one of the few cases to address germaneness in the FVRA context.[70]

Second, courts might also consider whether an IRC commissioner has the requisite management expertise to perform the functions and duties of a different officer. Again, without considering a particular acting designation, this inquiry is difficult to assess. But it seems plausible that a court could find IRC commissioners, senior officials in often complex and

[68] *See, e.g.*, 510 U.S. at 175 ("Thus, by contrast to civilian society, nonjudicial military officers play a significant part in the administration of military justice.").

[69] *See* West, *supra* note 58, at 220 n.281 (arguing "it strains credibility" to say the duties of Acting Director of the CFPB were already included within the office of Director of OMB).

[70] *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 356 F. Supp. 3d 109, 149 (D.D.C. 2019) (noting that a germaneness inquiry which required additional appointment of "department heads tapped to lead other, unrelated departments" would conflict with persuasive historical practice).

sprawling organizations, are expert enough in bureaucratic management that the administrative duties of a PAS office in a different agency are germane.

Third, the germaneness analysis may turn on the degree of accountability to the President exhibited by both the IRC commissioner and the officer whose functions and duties the IRC commissioner is directed to assume. This consideration seems most likely to create an Appointments Clause problem for designations of IRC commissioners. Recent developments in administrative law have grounded inquiries into presidential control of officers squarely in removability.[71] But IRC commissioners almost all enjoy some form of for-cause removal protection.[72] Thus, an IRC commissioner might be regarded as a species of officer different in kind from other PAS officers to whom FVRA § 3345(a)(2) might apply. The post to which they were confirmed is defined by its insulation from presidential control.[73] So any politically accountable functions and duties of offices in executive agencies cannot be germane to their existing responsibilities. Additionally, because acting officers are removable at-will,[74] the IRC commissioner's exposure to presidential control in their capacity as an acting officer may erode the independence Congress deemed essential to their ongoing duties in their PAS position. This distinction would narrowly address designations of IRC commissioners without sweeping in other interagency designations under § 3345(a)(2) inadvertently.

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[71] *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010). One might argue that designation of an IRC commissioner with for-cause removal protections to acting service in an at-will removable PAS position is unconstitutional under the Take Care Clause. But the Federal Circuit has recently held such an argument "has no merit" because, "[a]lthough the President must have cause to remove" a designee from their initial, protected position, "he needs no cause to remove" them from their role as a "temporary stand-in" for an officer without removal protection. Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1340 (Fed. Cir. 2022).

[72] *See* Datla & Revesz, *supra* note 13, at 776 & n.24.

[73] *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2376 (2001) (defining the President's removal power as "the core legal difference" between independent and executive agencies).

[74] *Arthrex*, 35 F.4th at 1340.

To the extent independent agencies have any special constitutional status,[75] litigants might analogize to *Mistretta v. United States*.[76] There, the Court held that Congress could delegate "nonadjudicatory functions" to the Judiciary provided those functions do not "trench upon the prerogatives of another Branch" or prove "[in]appropriate to the central mission of the Judiciary."[77] Defenders of IRC designations will note the Court found the President's appointment and removal powers over judges on the U.S. Sentencing Commission did not "afford him influence over the functions of the Judicial Branch or undue sway over its members."[78] By analogy, and perhaps *a fortiori* given the IRCs' location in the Executive, presidential removal power over an IRC commissioner serving as an acting officer would not meaningfully compromise the commissioner's independence in their IRC post.

On the other hand, the *Mistretta* Court noted that Congress had "safeguard[ed] the independence" of the Sentencing Commission by providing "that the President may remove the Commission members only for good cause."[79] But an IRC commissioner serving as an acting officer under FVRA enjoys no such protection and may thus be more susceptible to undue presidential influence.[80]

Overall, while the germaneness analysis will necessarily be fact-dependent, I think there is a strong case that the duties of officers in executive agencies are generally not germane to IRC commissioners. On the dimensions of subject-matter expertise and presidential accountability, challengers seem to have strong grounds for asserting the need for additional PAS procedure.

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[75] *But see* Datla & Revesz, *supra* note 13, at 774 (rejecting the notion that independent agencies are a cognizable "fourth branch").

[76] 488 U.S. 361 (1989).

[77] *Id.* at 388.

[78] *Id.* at 409.

[79] *Id.* at 410.

[80] *See* Arthrex, Inc. v. Smith & Nephew, Inc., 35 F.4th 1328, 1340 (Fed. Cir. 2022).

But at least three roadblocks may prevent those challengers from reaching germaneness at all. First, although *Weiss* applied *Shoemaker*'s germaneness analysis, it did so in the alternative.[81] The Court had seemingly already concluded that the germaneness test was unnecessary because the statute at issue "authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers."[82] This distinguished the case from *Shoemaker*, where Congress assigned new duties to two specific officers, raising the specter that Congress "was trying to create an office and also select a particular individual to fill" it.[83] Like the statute in *Weiss*, FVRA does not target the officers to whom new duties may be assigned with specificity but rather provides a broad, categorical authorization for such assignment. Thus, to the extent *Weiss* turns on this distinction from *Shoemaker* rather than its germaneness analysis, that analysis might not apply at all to designations of IRC commissioners.[84]

Second, at least one recent reading of the Supreme Court's Appointments Clause jurisprudence seems to preclude a germaneness inquiry. In *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, the U.S. District Court for the District of Columbia considered a constitutional challenge to Matthew Whitaker's service as Acting Attorney General under § 3345(a)(1).[85] The plaintiffs argued that "who performs" the functions and duties of a vacant PAS officer is the constitutionally relevant unit of analysis.[86] But the court rejected this argument

[81] Weiss v. United States, 510 U.S. 163, 174 (1994) (beginning the analysis only after "assum[ing], *arguendo*, that the principle of 'germaneness' applies to the present situation").

[82] *Id.* For a potential explanation for the Court's "obscure" reasoning, see Berry, *supra* note 66, at 178.

[83] *Weiss*, 510 U.S. at 173–74.

[84] *Weiss* also seemed to discount the need for a germaneness analysis on the grounds that Congress had not "effected a 'diffusion of the appointment power.'" *Id.* at 174 (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)). Which consideration was dispositive is unclear. *Id.* (listing several considerations, "at least one of which is significant").

[85] 356 F. Supp. 3d 109, 145–55 (D.D.C. 2019).

[86] *Id.* at 145.

outright.[87] Surveying Supreme Court precedent, the court concluded "that it is the 'special and temporary conditions' of acting service—and not the identity of the acting official—that makes such service constitutional."[88] A germaneness challenge, explicitly premised on the centrality of the acting official's identity and expertise, may be fundamentally misguided.

Finally, a germaneness challenge that attempts to narrow the field of PAS officers whom the President may direct to serve as acting officers would conflict with "the construction placed upon the Constitution" by members of the early Congresses.[89] As the *Guedes* court noted,[90] the Second Congress authorized the President to appoint "*any person . . . at his discretion* to perform the duties" of the Secretaries of State, Treasury, or War in the event of a vacancy.[91] Thus, although Congress may have subsequently restricted the President's range of selection, its early legislation suggests the Appointments Clause does not itself contain any restriction on the kind of person who can serve as an acting officer.

In summary, while a germaneness challenge to designation of IRC commissioners as acting officers appears plausible on the merits, I conclude courts are unlikely to entertain it.

Conclusion

The use of FVRA to designate IRC commissioners as acting agency heads would present novel questions of law and could pose a significant threat to the balance of power between the political branches. My assessment of two potential arguments against such an unprecedented aggrandizement of Executive power may be unsatisfying to some. Neither the text of FVRA nor

[87] *Id.* at 148.

[88] *Id.* at 149 (quoting United States v. Eaton, 169 U.S. 331, 348 (1898)) (citation omitted).

[89] Golan v. Holder, 565 U.S. 302, 321 (2012) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884)) (holding such constructions are "entitled to very great weight").

[90] 356 F. Supp. 3d at 148.

[91] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281 (emphasis added).

the doctrine of germaneness appear to yield viable challenges to the practice. But there are other options. More sweeping challenges to the FVRA scheme could obviate the need for the targeted arguments I described. And Congress can always amend FVRA to exclude IRC commissioners from § 3345(a)(2). But any action should come swiftly. FVRA should be a tool to tamp down the fires of interbranch conflict, not a can of kerosene waiting in the wings.

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WRITING SAMPLE

I drafted the attached writing sample as an assignment for *Advanced Legal Writing: Appellate Litigation*. The assignment required drafting an appellate brief analyzing whether the Communications Decency Act, 47 U.S.C. § 230, immunized Snap, Inc.—the developer of the mobile application Snapchat—against claims that Snap was liable for a fatal car accident because one of Snapchat's features encouraged dangerous driving. I was assigned to represent Snap. The record in the case was taken from *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), with some superficial changes. I independently conducted all relevant research, and my instructor limited our research to cases decided before 2021. I drafted the brief independently and with structural guidance from my instructor. By the assignment's instructions, the brief could not exceed thirty pages.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

This case beings with a tragedy. In May 2017, Kyle Davis lost control of his car while speeding at over 110 miles per hour. Davis and his two passengers, Landen Fox and Parker Morris, passed away in the resulting crash. Minutes before the collision, someone in the vehicle recorded and published its speed using a speedometer filter (the "Filter") contained within Snapchat—a mobile application developed by Snap, Inc. Plaintiffs, the parents and estates of Fox and Morris, allege Snap is responsible for the crash.

Plaintiffs' Amended Complaint presents a complicated question with a straightforward answer. Determining whether internet platforms like Snap may be held liable for injuries allegedly resulting from the content their users create, publish, and view implicates some of the most contentious policy debates of our increasingly digital world. But the Court need not make that determination. Congress has already delineated the bounds of liability for online publishers. And well-established tort principles assign legal responsibility for car crashes.

Applying this settled law, the Court should affirm the district court's dismissal of the Amended Complaint for two independent reasons. First, the Communications Decency Act, 47 U.S.C. § 230, immunizes internet platforms like Snap against liability for publishing third-party content and bars Plaintiffs' claims. Second, the Amended Complaint fails as a matter of law because it does not allege Snap proximately caused Plaintiffs' injuries. Either ground merits affirmance.

Below, the district court correctly held that the CDA precludes Plaintiffs' claims. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), this Court interpreted the CDA to immunize internet platforms like Snap under three conditions. As the district court found, all three are present here. ER11–15. Snap is (1) a provider of an interactive computer service

(2) whom Plaintiffs seek to treat, under state law claims, as a publisher or speaker (3) of information provided by another information content provider. *Barnes*, 570 F.3d at 1100–01.

First, Plaintiffs do not and cannot dispute that Snap provides an interactive computer service: the Snapchat app it developed. *See* ER10; ER79 ¶ 24. Second, the district court properly determined the Amended Complaint would treat Snap as a publisher because "the crux" of Plaintiffs' claims is that Snap did not exercise its editorial discretion to restrict or remove certain user-created content. ER14. And third, posts that users create with the Filter are developed by other information content providers—Snapchat users—because the Filter is a content-neutral tool that "merely provide[s] a framework that could be used for proper or improper purposes." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc) ("*Roommates*"). That is so because Snap "does not require any user" to post with the Filter, the Filter "can be used at low or high speeds," and Snap does not encourage users to post with the Filter while driving recklessly. ER13.

The Court should affirm the district court's routine application of Ninth Circuit CDA precedent. However Plaintiffs frame their Amended Complaint—as claims for garden-variety negligence, design defect, or failure to warn—it runs headlong into the CDA's aegis. Plaintiffs would hold Snap liable for publishing user-generated posts created with a content-neutral tool. The CDA bars such claims, and the district court properly dismissed the Amended Complaint.

But even if the CDA did not apply, tort law provides an independent basis to affirm: The Amended Complaint does not allege Snap proximately caused Plaintiffs' injuries. The district court dismissed Plaintiffs' original complaint for that reason. ER27. And the Amended Complaint offers no novel support for the "encouragement theory" of causation the district court found "too vague and speculative." ER27. Moreover, courts across the country hold that reckless

drivers are the legal cause of accidents even when mobile apps happen to lie upstream in the causal chain. *See, e.g.*, *Modisette v. Apple, Inc.*, 241 Cal. Rptr. 3d 209 (Cal. Ct. App. 2018); *Meador v. Apple, Inc.*, 911 F.3d 260, 263 (5th Cir. 2018). As a result, the Amended Complaint fails as a matter of law.

The district court correctly held the CDA bars Plaintiffs' claims. And the Amended Complaint cannot state a claim because it does not allege Snap proximately caused Plaintiffs' injuries. Under either the CDA or tort principles of proximate cause, the Court should affirm.

JURISDICTIONAL STATEMENT

The United States District Court for the Central District of California took jurisdiction under 28 U.S.C. § 1332(a)(1). ER24; ER78 ¶ 21. It granted Snap's motion to dismiss the Amended Complaint with prejudice and entered final judgment on February 20, 2020. ER5; ER16. Plaintiffs timely filed their notice of appeal on March 18, 2020. ER32; Fed. R. App. P. 4(a)(1)(A). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

STATUTORY AUTHORITIES

The relevant provisions of the Communications Decency Act, 47 U.S.C. § 230, appear in the Addendum to this brief.

ISSUES PRESENTED

1. The Communications Decency Act immunizes internet platforms against liability for publishing content created by third parties. Plaintiffs seek to hold Snap liable for allowing users to create and publish content overlaid with a speedometer. Did the district court properly dismiss Plaintiffs' claims as barred by the CDA?

2. In the alternative, does the Amended Complaint fail as a matter of law because it does not allege Snap proximately caused Plaintiffs' injury?

STATEMENT OF THE CASE

The Crash on Cranberry Road. Cranberry Road ambles through the farmland, knobs, and glacial wetlands of Walworth County, Wisconsin. The narrow, hilly route—paved in stretches and composed of gravel in others—takes its name from the nearby marshes where early settlers harvested their crop. By all accounts, it makes for a pleasant summer evening drive. And Wisconsin has gone so far as to designate it a state "Rustic Road" for its bucolic vistas and arboreal variety. Wis. Dep't of Transp., *Wisconsin Rustic Roads Guide* 26 (2022).

But in the waning days of May 2017, it was the site of tragedy. ER84 ¶ 63. Just before sundown, Kyle Davis, Landen Fox, and Parker Morris packed into a car and barreled down Cranberry Road. ER84 ¶¶ 63–64. Davis, at the wheel with Fox seated to his right and Morris behind, accelerated to more than 120 miles per hour. ER84–85 ¶¶ 63–64, 69. At some point, Davis lost control of the vehicle and careened off the road with Fox and Morris in tow. ER76 ¶ 6. The car slammed into a tree, and Davis and his companions tragically passed away. ER85 ¶ 70. Local investigators estimate that Davis crashed at over 110 miles per hour. ER85 ¶ 72. Some minutes before the collision, Fox opened the Snapchat app on his phone from the passenger seat, and someone—the Amended Complaint does not allege whom—published their speed on Snapchat with the Filter. ER84–85 ¶¶ 66, 69–70.

Snap, Snapchat, and the Filter. Snap is a social media company whose primary business is operating a mobile application: Snapchat. ER79 ¶ 24. Snapchat allows users to create, upload, send, and receive digital content, principally—as the app's name suggests—mobile photos and videos. ER79 ¶ 24. Snapchat serves as an intermediary messaging platform, publishing the photos and videos its users "snap" so they can express themselves and communicate with one another. *See* ER70 ¶¶ 24, 26. To post on Snapchat, users must agree to its

terms of service which require that they "never Snap and drive" or use the app in any other "way that would distract [them] from obeying traffic or safety laws." ER121.

Before publishing a photo or video, Snapchat users can modify it with tools within the app. ER79 ¶¶ 24–25. One of those tools, the Filter, is an overlay that users can superimpose on a still image or video. ER79 ¶ 25. The Filter allows users to record their present, real-life speed and display it in the content they choose to share through Snapchat. ER79 ¶¶ 25–26. It functions "essentially [as] a speedometer," and like a speedometer it can be used at any speed. ER13.

Users are not required to use the Filter at any particular speed or to use it at all. ER13–14. And while Snap rewards users for consuming Snapchat in some ways, ER79 ¶ 27, it offers no reward for using the Filter while driving at dangerous speeds, ER13–14. In fact, when users activate the Filter, they are warned: "DO NOT Snap and drive." ER111. And when users input a speed over fifteen miles per hour, they are again warned: "DON'T SNAP AND DRIVE." ER114. Nevertheless, among Snapchat's several hundred million users, ER25, at least four have been involved in accidents while speeding and using the Filter, ER82–84 ¶¶ 45–60.

The District Court Dismisses Plaintiffs' Complaint. Two years after Davis, Fox, and Morris passed away, Plaintiffs—the parents and estates of Fox and Morris—filed suit against Snap in the Central District of California. ER141 ¶¶ 2–4. Their original complaint alleged Snap was negligent because it allowed users to publish content showing themselves traveling at dangerous speeds. ER148 ¶ 51. According to Plaintiffs, that publication decision encouraged dangerous driving and caused the accident that killed Fox and Morris. ER148 ¶ 51. Snap, the complaint alleged, should have removed, or restricted access to, the Filter when users traveled at high speeds. ER148 ¶ 56.

The district court granted Snap's motion to dismiss the complaint without prejudice. ER18. It held that Plaintiffs failed to allege a causal connection between Snap's conduct and their injuries. ER27. The district court found the complaint did not "allege[] sufficient details" to demonstrate the Filter was "used close in time to the accident" or "allege[] sufficient facts to establish that [Snap] actually encouraged speeding." ER27. Rather, Plaintiffs' "encouragement theory" of causation was "too vague and speculative" to support a claim. ER27. Because the district court dismissed the complaint on those grounds, it did not reach Snap's alternative argument that Plaintiffs' claims were barred by the CDA. ER30.

Plaintiffs Amend, and the District Court Dismisses Again. Plaintiffs then filed their Amended Complaint. ER75. The Amended Complaint adds three sets of new allegations. First, Plaintiffs crafted an introduction summarizing their legal arguments. *See* ER76–78 ¶¶ 1–16. Second, Plaintiffs peppered the Amended Complaint with quotes from online articles stating in conclusory terms that the Filter motivates users to drive dangerously. *See, e.g.*, ER76–81 ¶¶ 9–11, 28–30, 35–38. Finally, Plaintiffs appended a pair of allegations that Snap's warnings not to use Snapchat while driving are insufficient. ER85–86 ¶¶ 78–79. But the Amended Complaint lacks any new allegations concerning the functionality of the Filter or identifying conduct by which Snap encourages dangerous driving.

Snap again moved to dismiss, and the district court again granted its motion. ER5. This time, the district court did not reach causation because it held the Amended Complaint was barred by the CDA. ER5. Applying this Court's three-part test for CDA immunity outlined in *Barnes*, 570 F.3d at 1100–01, the district court observed that "Plaintiffs appear to concede that the first two prongs apply and only challenge the third prong," ER10. That is, Plaintiffs argued

only that Snap is a co-developer of posts users create with the Filter and that, as a result, those posts are not "provided by another information content provider." *Barnes*, 570 F.3d at 1101.

Because the content of posts created with the Filter is "entirely left to the user," the district court concluded the Filter is a "neutral tool" protected by the CDA. ER13–14. It further held that the user-generated content of those posts is "at the crux of Plaintiffs' claims" and that "Plaintiffs are seeking to hold [Snap] responsible for failing to regulate what . . . users post through" the Filter. ER14. Because the CDA precludes such a claim, and because the "facts relating to CDA immunity are undisputed," the district court dismissed the Amended Complaint with prejudice and entered judgment for Snap. ER15–16.

Plaintiffs timely appealed, and this action followed. ER32.

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's dismissal of Plaintiffs' Amended Complaint on either of two alternative grounds. First, Plaintiffs' claims are barred by the CDA. Second, the Amended Complaint fails to allege Snap proximately caused Plaintiffs' injuries.

I. The district court correctly held the CDA bars Plaintiffs' Amended Complaint. The CDA immunizes Snap against liability because Snap is (1) a provider of an interactive computer service (2) whom Plaintiffs seek to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider. *Barnes*, 570 F.3d at 1100–01.

A. Snap indisputably provides an interactive computer service. Plaintiffs did not argue otherwise below. *See* ER10. And the Amended Complaint alleges Snap developed Snapchat, ER79 ¶ 24, a mobile application whose functions fall squarely within this Court's

"expansive" interpretation of the CDA's scope, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

B. The Amended Complaint treats Snap as a publisher or speaker because the duty it alleges Snap breached, and the conduct that allegedly breached that duty, both "derive[] from [Snap's] status or conduct as a publisher." *Barnes*, 570 F.3d at 1102 (internal quotation marks omitted). Specifically, the Amended Complaint would hold Snap liable for failing to exercise its editorial discretion to restrict the publication of objectionable content. *See* ER86 ¶ 82. Put simply, "the content" of posts created with the Filter "is at the crux of Plaintiffs' claims." ER14. Moreover, Plaintiffs point to no authority which can wrest the Amended Complaint from the CDA's scope. Plaintiffs cannot invoke those cases distinguishing failure-to-warn claims from this Court's core CDA jurisprudence because the Amended Complaint would require Snap to monitor and moderate users' content. And the only case Plaintiffs cite which concerns whether the Amended Complaint would treat Snap as a publisher is nonbinding, unpersuasive, and distinguishable.

C. Posts created with the Filter are "provided by another information content provider." *Barnes*, 570 F.3d at 1100–01. Although Snap designed the Filter, under this Court's neutral-tools analysis, Snap does not develop the content users create with the Filter because it "merely provide[s] a framework that could be used for proper or improper purposes." *Roommates*, 521 F.3d at 1172. The district court correctly held that it "cannot simply presume" Snap developed posts made with the Filter on Plaintiffs' say-so. ER11. Rather, the Court must determine whether the Filter is a content-neutral tool. *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). The Filter is a neutral tool because Snap does not "require users" to interact with it or otherwise "encourage illegal content." *Roommates*, 521 F.3d at 1175.

Users interact with the Filter voluntarily. ER14. And far from "materially contribut[ing]" to users' reckless behavior, *Dyroff*, 934 F.3d at 1099, Snap explicitly discourages use of its products while driving, ER11; ER114; ER121.

II. Alternatively, the Court should affirm because the Amended Complaint does not allege Snap proximately caused Plaintiffs' injuries. The district court dismissed Plaintiffs' original complaint because their "encouragement theory" of causation was "too vague and speculative." ER27. Nothing in the Amended Complaint cures this defect. And well-settled precedent holds that drivers are the legal cause of car accidents where, as here, they misuse an interactive computer service provider's product behind the wheel. *See, e.g.*, *Modisette*, 241 Cal. Rptr. 3d at 209; *Meador*, 911 F.3d at 263.

STANDARD OF REVIEW

This Court reviews de novo a district court order dismissing a plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) and questions of statutory interpretation. *Dyroff*, 934 F.3d at 1096. To assess a complaint, this Court applies the familiar pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

ARGUMENT

The Court should not disturb the district court's order dismissing Plaintiffs' Amended Complaint for two independent reasons. First, the Communications Decency Act precludes Plaintiffs' claims because they would hold Snap liable as a publisher of third-party content. Second, and alternatively, the Amended Complaint does not allege Snap proximately caused Plaintiffs' injuries.

I. The CDA immunizes Snap against Plaintiffs' claims because the Amended Complaint seeks to hold Snap liable as a publisher of third-party content.

The Communications Decency Act immunizes internet platforms like Snap against liability for publishing third-party content. In relevant part, the CDA states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). And this Court has cautioned that those interpreting the CDA "must keep firmly in mind that [it] is an immunity statute" and that "close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230." *Roommates*, 521 F.3d at 1174.

But this is not a close case. Plaintiffs seek to hold Snap liable for publishing third-party content they find objectionable, and their claims must be barred. In *Barnes*, this Court held the CDA immunizes a defendant against liability where, as here, they are: (1) a provider of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider. 570 F.3d at 1100–01. Each of these elements is satisfied, and the CDA shields Snap from Plaintiffs' claims.

A. Snap provides an interactive computer service.

There is no dispute that Snap provides an interactive computer service. Plaintiffs did not contest Snap's status as an interactive computer service provider below. *See* ER10. Nor can they here. The CDA defines an interactive computer service provider as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Plaintiffs allege Snap developed Snapchat, an application that allows "users to create, upload, post, send, receive, share, and store digital

content." ER79 ¶ 24. Those allegations fall squarely within this Court's "expansive" interpretation of the CDA's scope. *Carafano*, 339 F.3d at 1123.

B. The Amended Complaint treats Snap as a publisher or speaker because Plaintiffs' claims arise from Snap's editorial control over posts made with the Filter.

The CDA bars Plaintiffs' claims because the Amended Complaint "seeks to treat [Snap], under a state law cause of action, as a publisher or speaker." *Barnes*, 570 F.3d at 1100. Plaintiffs cannot escape this conclusion for two reasons: (1) However they frame their Amended Complaint, Plaintiffs ask the Court to hold Snap liable for exercising traditional publisher functions; and (2) Plaintiffs point to no persuasive authority to the contrary.

1. Although Plaintiffs adopt the language of product liability, their artful pleading cannot disguise that the Amended Complaint treats Snap as a publisher.

The Amended Complaint seeks to hold Snap liable as a publisher or speaker because the duty Snap allegedly violated and the actions that allegedly breached that duty "derive[] from [Snap's] status or conduct as a publisher or speaker." *Barnes*, 570 F.3d at 1102 (internal quotation marks omitted). A plaintiff cannot plead around the CDA "simply by changing the name of the theory" on which they seek relief. *Id.* Rather, the "essential question" is whether the Amended Complaint "inherently requires the [C]ourt to treat [Snap] as a publisher or speaker." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016) (internal quotation marks omitted) (quoting *Barnes*, 570 F.3d at 1100–02). To make this determination, the Court need only look to the Amended Complaint's factual allegations and assess whether the duty at issue, and the actions that allegedly constitute a breach of that duty, arise from Snap's status as a publisher. *See Barnes*, 570 F.3d at 1102–03.

The CDA does not define "publisher," and courts have adopted a "capacious conception" of the term. *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) ("*Backpage*"). But

the Court need not venture into the far reaches of the CDA's scope. Notwithstanding the Amended Complaint's product-liability frame, Plaintiffs' claims implicate the core publisher functions this Court identified in *Barnes*: "reviewing, editing, and deciding whether to publish or to withdraw [content] from publication." 570 F.3d at 1102.

A survey of the Amended Complaint illustrates the point. Plaintiffs purport to bring a product liability claim. What is the product at issue? The Filter that "allows users to record their real-life speed" and "then share[] it on social media." ER79 ¶¶ 25–26. What is the Filter's alleged defect? It "allows users to post videos, in some cases showing their dangerous pace." ER77 ¶ 9. Why is this a defect? Because such posts allegedly encourage speeding by "tell[ing] [users] 'Hey go faster.'" ER82 ¶ 40. So what was Snap's alleged duty? Snap should have removed user posts created with the Filter or restricted users' ability to post with the Filter at certain speeds. ER85 ¶ 75. And why was Snap negligent? "Snap breached [its alleged] duty because . . . it did not remove, abolish, [or] restrict access" to certain posts created with the Filter. ER86 ¶ 82. In short, Plaintiffs would hold Snap liable because it did not exercise its editorial discretion in the way they want: by restricting the publication of content that allegedly communicates an objectionable message.

But such a claim strikes at the heart of Snap's CDA immunity. "[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Roommates*, 521 F.3d at 1170–71. However Plaintiffs title their claims, the Amended Complaint alleges Snap breached a duty to police the content of its users' posts.

And Plaintiffs do not rest the Amended Complaint on anything other than the publication of content. Indeed, the district court found "the content" of posts created with Filter "is at the

crux of Plaintiffs' claims." ER14. The Amended Complaint makes clear that any alleged encouragement to drive dangerously arises not from the design of the Filter, but from the constellation of *user posts* made with Filter. Plaintiffs allege users drive recklessly "because they want to use the Snapchat [app] to capture a mobile photo or video . . . and then share the [s]nap with their friends." ER80 ¶ 33. They "do it 'for the likes,'" i.e., for the fun of others seeing the content they publish. ER81 ¶ 37. In other words, users see their friends' posts and are inspired to publish content of their own.

Reading the Amended Complaint to allege that published content rather than the Filter encourages speeding makes sense. After all, the "Filter is essentially a speedometer." ER13. And as Plaintiffs allege, "'[l]ooking at [a] speedometer . . . isn't as much fun' as 'capturing the car accelerating on camera and then sharing [it] with all your friends.'" ER81 ¶ 35. The point of differentiation—and the variable that allegedly encourages reckless driving—is not anything inherent in the Filter but the user's desire to "capture the perfect the moment" and publish their content for others to see. ER81 ¶ 38.

Plaintiffs assert their claims do not rest on the content of the post published just before the crash. ER55. True enough. No singular post harmed the Plaintiffs. Rather, *all the posts* using the Filter that Davis, Fox, and Morris saw allegedly caused the crash. But that is a distinction without a difference: Either way, Plaintiffs seek to hold Snap liable as a publisher of users' posts.

And even if the Amended Complaint did target the design of the Filter rather than users' posts, the CDA would still bar it. Snap's policies regarding "how to treat postings," "structur[al] and operation[al]" judgments, and "overall design" are "editorial decisions that fall within the purview of traditional publisher functions." *Backpage*, 817 F.3d at 21. Thus, in *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) ("*MySpace I*"), the CDA barred the plaintiffs' claims

despite "their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented" their daughter from seeing objectionable content. An allegation that Snap should have designed the Filter to prevent users from seeing or sharing content showing reckless driving would be no different. That is "merely another way of claiming that [Snap] [is] liable for publishing" posts with the Filter. *Id.* at 420. And this conclusion holds whether Plaintiffs frame their claims affirmatively or negatively. Snap's "provision" of the Filter and decision to publish user posts made with it "are no less publisher choices" than a decision not to censor those posts. *Backpage*, 817 F.3d at 21.[1]

Because Plaintiffs' claims concern Snap's exercise of core editorial functions, the Amended Complaint seeks to treat Snap as a publisher or speaker under a state-law cause of action. As a result, Plaintiffs' claims are barred by the CDA. *Barnes*, 570 F.3d at 1100.

2. Plaintiffs' cited authority does not undermine the district court's conclusion that the Amended Complaint treats Snap as a publisher.

Plaintiffs offer no authority compelling the Court to disturb the district court's finding that the Amended Complaint would hold Snap liable as a publisher. ER10. The Court should affirm that finding for three reasons: (1) Plaintiffs' failure-to-warn allegations do not rescue the Amended Complaint because their claims are fundamentally premised on Snap's editorial control over user posts; (2) nearly every case Plaintiffs cited below was resolved on other grounds; and (3) the only case Plaintiffs cited that relates to whether the Amended Complaint would treat Snap as a publisher is nonbinding, unpersuasive, and distinguishable.

[1] Nor is it relevant that Plaintiffs' injuries "actually resulted from conduct that occurred outside of the information exchanged" in user posts. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 157 (Cal. Ct. App. 2009). This Court and others consistently hold that CDA immunity inheres even when offline conduct causes a plaintiff's injury. *E.g.*, *Carafano*, 339 F.3d at 1121–22 (plaintiff harassed at her home); *MySpace I*, 528 F.3d at 416 (sexual assault); *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1101 (C.D. Cal. 2017) (violations of lease agreements).

First, Plaintiffs cannot wrest the Amended Complaint from the CDA's scope by alleging, in conclusory terms, that Snap's warnings not to use Snapchat while driving were inadequate. ER85–86 ¶¶ 77–79. In *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 854 (9th Cir. 2016), this Court held the CDA did not bar a plaintiff's failure-to-warn claim against a website that knew rapists were using it to target victims. But because Plaintiffs' claims rest on Snap's exercise of core publisher functions, *Internet Brands* is inapposite. The plaintiff there did "not claim to have been lured [into danger] by any posting that Internet Brands failed to remove." *Id.* at 851. And her "failure to warn claim ha[d] nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user[-]generated content." *Id.* at 852. Not so here. Plaintiffs allege Davis was encouraged to speed by Snapchat posts, *see supra* at 12–13, and assert Snap had a duty to "remove, abolish, [or] restrict access to" posts made with the Filter while driving, ER86 ¶ 82.

The contrast between this case and *Internet Brands* comes into starker relief when assessing the substance of Snap's and Internet Brands' respective duties. In *Internet Brands*, "[a]ny obligation to warn could have been satisfied without changes to the content posted by the website's users and without conducting a detailed investigation." 824 F.3d at 851. But Plaintiffs allege Snap is liable because it "did not remove or restrict access to Snapchat while [users were] traveling at dangerous speeds." ER85 ¶ 76. Snap could have fulfilled this duty only by monitoring its users' speed, determining whether a user was acting dangerously, and censoring certain posts with the Filter. Those are core publisher functions protected by the CDA.

And *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2016), is also distinguishable. There, the CDA did not preempt an ordinance directing platforms to check rental listings against a registry because the only monitoring required was "distinct, internal, and nonpublic" and the platforms had "*no* editorial control over the [content to be monitored]

whatsoever." *Id.* at 682. But here, the Amended Complaint alleges Snap had a duty to monitor public, user-generated content and to exercise editorial control over it by restricting its publication because of its substance. *See* ER85 ¶ 76. The CDA bars such a claim.

Second, Plaintiffs' cited authority does not stand for the proposition that their Amended Complaint would hold Snap liable as something other than a publisher or speaker. Instead, Plaintiffs contend only that Snap developed the content it published. *See* Dkt. No. 55 at 24 ("Plaintiffs seek to hold Snap liable for its own content . . . ."). Indeed, with a lone exception, *every* case analyzing the CDA cited in Plaintiffs' opposition to Snap's motion to dismiss, *id.* at 22–25, was resolved on the third *Barnes* inquiry or its substantive equivalent:

- *Roommates*, 521 F.3d 1157, 1167 (9th Cir. 2008) (finding the CDA did not apply to content of which Roommates.com was a co-developer, but did apply to content for which it was a "passive conduit");
- *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) ("The CDA only immunizes 'information provided by *another* information content provider.'" (quoting 47 U.S.C. § 230(c)(1));
- *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (finding the CDA inapposite where plaintiffs "allege[d] that Facebook contributes, at least in part, to the creation or development" of the content at issue);
- *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1044 (N.D. Cal. 2014) (declining to dismiss where "Apple's alleged conduct potentially constitutes contribution to the alleged illegality in a manner that invokes the 'information content provider' exception to the CDA's protections");
- *Grossman v. Rockaway Twp.*, No. MRS-L-1173-18, 2019 WL 2649153, at *10 (N.J. Super. Ct. Law Div. June 10, 2019) (holding "only that there are insufficient facts alleged . . . to conclude Snap is an information content provider in this case").

Finally, *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77 (Ga. Ct. App. 2018)—the only case Plaintiffs cited below relevant to whether the Amended Complaint treats Snap as a publisher—is (1) nonbinding, (2) unpersuasive, and (3) distinguishable.

First, *Maynard*, a case from Georgia's intermediate appellate court, is nonbinding and valuable only to the extent it provides some persuasive interpretation of applicable law.

But, second, *Maynard* did not seriously engage with this Circuit's interpretation of "publisher" as used in the CDA. Indeed, the district court in this action did "not find the holding in *Maynard* to be persuasive" because of this inattention to Ninth Circuit caselaw. ER15. The *Maynard* plaintiffs brought negligence claims against Snap after surviving a car accident allegedly caused by a driver attempting to post with the Filter. 816 S.E.2d at 79. The offending driver was "about to post" using the Filter in the moments before the accident, but crashed into the plaintiffs' vehicle before she could post any content. *Id.* Although *Maynard* surveyed this Court's holdings on when a claim derives from the defendant's status as a publisher or speaker, it elided application of *Barnes* on the narrow factual grounds that "no posts were made." *Id.* at 80.

Third, for that reason, *Maynard* is distinguishable. Here, Plaintiffs allege someone in the car with Fox and Morris published content on Snapchat minutes before the crash. ER84–85 ¶¶ 66–70. And even setting aside the factual contingencies in the moments leading up to the crash, it is simply not the case, as in *Maynard*, that the Amended Complaint "does not allege that Snap[] was the publisher or speaker of *any* third-party content." 816 S.E.2d at 81 (emphasis added). To the contrary, the Amended Complaint alleges Snap publishes all sorts of third-party content. *E.g.*, ER77 ¶ 13 (alleging Snap encourages users to capture "a photo or video, and then share" it); ER80 ¶ 33 (alleging Snapchat users "use the [app] to capture a mobile photo or video . . . and then share" it).

Because *Maynard* is inapposite, and because Plaintiffs point to no other compelling authority, the Court need not disturb the district court's finding that the Amended Complaint would hold Snap liable as a publisher or speaker. [2]

[2] Alternatively, the Court can find Plaintiffs have conceded the Amended Complaint treats Snap as a publisher. Absent exceptional circumstances, this Court "will not consider arguments which were not first raised before the district court." *Monetary II Ltd. P'ship v. Comm'r*, 47 F.3d 342, 348 (9th Cir. 1995) (internal quotation marks omitted) (quoting *Fed. Sav. & Loan Ins. Corp. v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990)). In its orders dismissing

C. Posts created with the Filter are third-party content because the Filter is a content-neutral tool protected by the CDA.

The CDA bars the Amended Complaint because it seeks to hold Snap liable for publishing "information provided by another information content provider." *Barnes*, 570 F.3d at 1101. Because the Amended Complaint would hold Snap liable as a publisher, Snap "qualifies for immunity so long as it does not . . . [also] function as an 'information content provider'" of user-generated posts created with the Filter. *Carafano*, 339 F.3d at 1123. Snap does not function in this way because the Filter is a content-neutral tool. *See Dyroff*, 934 F.3d at 1096.

The CDA defines an information content provider as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through" an interactive computer service. 47 U.S.C. § 230(f)(3). But as this Court has warned, an overbroad reading of the CDA's "in whole or in part" language "would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides." *Roommates*, 521 F.3d at 1167.

Thus, when an interactive computer service "provides neutral tools that a user exploits" to develop objectionable content, it does not become an information content provider of that user-generated content. *Dyroff*, 934 F.3d at 1099. Rather, an interactive computer service like Snap outstrips its CDA immunity only "[w]here it is very clear that the website directly participates in developing the alleged illegality." *Roommates*, 521 F.3d at 1174. Because the Filter is a neutral tool that "merely provide[s] a framework that could be used for proper or

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both the complaint and Amended Complaint, the district court concluded Plaintiffs do not contest that the Amended Complaint would treat Snap as a publisher. *See* ER10; ER28. And for good reason. At oral argument on Snap's motion to dismiss the complaint, Plaintiffs conceded the Filter "is part of [Snap's] publishing platform." ER96. And, in their telling, "the question [presented by the Amended Complaint] is whether [Plaintiffs'] claims are based on Snap's content or whether they're based on user's [sic] content. . . . [T]here's no question that the . . . [F]ilter is content." ER51. On that basis, and because they offered no relevant authority on this point below, *see supra* at 14–17, Plaintiffs have waived any argument that the Amended Complaint would hold Snap liable as something other than a publisher or speaker.

improper purposes," Snap is not an information content provider of posts created with the Filter, and the CDA bars the Amended Complaint. *Id.* at 1172.

1. The district court properly inquired whether the Filter is a content-neutral tool.

Because Plaintiffs seek to treat Snap as a publisher of posts made using the Filter, this Court must determine whether the Filter is a content-neutral tool. In dismissing the Amended Complaint, the district court "reject[ed] Plaintiffs' argument that the Court need not examine whether the Speed Filter is a neutral tool." ER11. The district court was correct, and the Court should not resurrect Plaintiffs' contrary position here.

Plaintiffs assert the Court cannot conduct a neutral-tools analysis because the Amended Complaint does not explicitly state that it "seeks to hold [Snap] liable for *someone else's* content." Dkt. No. 55 at 22. But that argument begs the question the analysis is designed to answer.[3] The neutral-tools test determines whether content a plaintiff alleges was created by a platform was in fact developed by a third party using the platform's content-neutral tools. *See, e.g.*, *Dyroff*, 934 F.3d at 1098–99 (determining certain website features were "content-neutral tools" where a plaintiff alleged those features made defendant an information content provider). Plaintiffs' Amended Complaint presents that question.

And the district court correctly concluded that it "cannot simply presume that the Speed Filter *is* 'content' because Plaintiffs allege it is; rather, the [c]ourt must determine whether the Speed Filter is a 'content-neutral tool' or 'content.'" ER11. If courts were forced to forgo a neutral-tools analysis on a plaintiff's say-so, "the CDA's immunity provisions [would be] meaningless." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016). "[I]t is not difficult to

[3] The neutral-tools analysis would tilt at windmills if it applied only when a plaintiff whose claims otherwise trigger CDA immunity also alleges they seek to hold a defendant liable for publishing someone else's content. Such an imprudent plaintiff would have pleaded themselves into the scope of the CDA unassisted.

allege in a complaint that a publisher of information engaged in creation by transformation." *Id.* Thus, the neutral-tools test stands as a bulwark against attempts to "plead around Section 230 immunity." *Dyroff*, 934 F.3d at 1098.

To be sure, the nonconclusory facts presented in a complaint sometimes suffice to allege a defendant was an information content provider without need for a neutral-tools analysis. But the Amended Complaint does not present such facts. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164–65 (9th Cir. 2008), this Court eschewed a neutral-tools analysis where the defendant forced users to describe their ideal roommate's sex, marital status, and sexual orientation with pre-written responses it composed. That requirement "induc[ed] third parties to express illegal preferences" in violation of federal law prohibiting certain forms of discrimination in housing markets. *Id.* at 1165. But here, Plaintiffs do not allege Snap requires users to post with the Filter. *See* ER13 (district court finding that whether and how users post with the Filter "appears to be entirely left to the user"). And Snap "does not require any user to [capture and share] a high speed" with the Filter. ER13. Unlike the defendant in *Roommates*, Snap does not force its users to break the law.

This Court generally engages in a neutral-tools analysis to determine whether content a plaintiff alleges was developed by a defendant was, in fact, developed by third parties. Here, Plaintiffs make such an allegation, and the Amended Complaint does not present extraordinary facts obviating the need for this analysis. Accordingly, the district court properly held that Plaintiffs must grapple with the neutral-tools test.

2. The district court correctly determined that posts created with the Filter are third-party content because the Filter is a neutral tool.

The district court correctly held Snap is not an information content provider of posts created with the Filter because the Filter is a neutral tool. In *Roommates*, this Court identified the

type of conduct that does not constitute development, in whole or in part, of content under the CDA. 521 F.3d at 1167–74. When a platform "merely provide[s] a framework that could be utilized for proper or improper purposes"—a content-neutral tool—it does not become an information content provider of the posts users create with that framework. *Id.* at 1172. But where a platform requires its users to engage with a feature it created, or where it "contributes materially to the alleged illegality" of a user's post, it becomes a co-developer of the content at issue and loses its CDA immunity. *Id.* at 1168–69. "The message" *Roommates* conveys "is clear: If [platforms] don't encourage illegal content, or design [their] website[s] to require users to input illegal content, [they] will be immune." 521 F.3d at 1175.

Snap is not an information content provider of posts made with the Filter because (1) whether and what users post with the Filter is entirely voluntary and (2) the Filter does not encourage users to post the allegedly tortious content at the heart of Plaintiffs' Amended Complaint. As a result, the Filter is a neutral tool that merely "facilitates the expression of information by individual users" at the users' discretion, Snap did not develop posts made with the Filter, and the CDA immunizes Snap against Plaintiffs' claims. *Carafano*, 339 F.3d at 1124.

First, the Filter is a neutral tool because Snap does not require users to interact with, or post any particular kind of content with, the Filter. Instead, as the district court found, the "selection" of the content to be displayed in a post using the Filter is "entirely left to the user." ER14. And without user inputs, the Filter itself has no content: It is merely a blank miles-per-hour display on a blank screen. *See* ER111.

Thus, the Filter functions like the "Additional Comments" feature this Court deemed a neutral tool in *Roommates*. 521 F.3d at 1173. That feature prompted users to describe themselves and their desired cohabitant in their own words. *Id.* at 1173–74. Like the Filter, the Additional

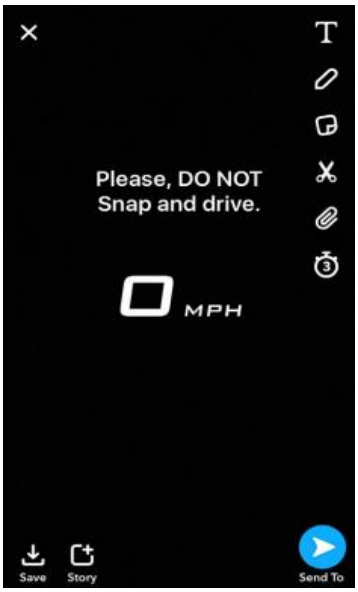
Comments tool was a "blank text box" in which a user could input whatever information "he wishes." *Id.* at 1173. And like the defendant in *Roommates*, Snap publishes posts made with the Filter "as written"; it does not "urge subscribers" to create the allegedly tortious content of which Plaintiffs complain. *Id.* Indeed, Plaintiffs' claims rest on Snap's indifference to what users post with the Filter. *See* ER85 ¶ 75; ER86 ¶ 82. Rather than censoring the content users create with the Filter, Snap allows its users to show themselves traveling "at low or high speeds." ER13.

Because the Filter empowers users to decide what content they post, it is unlike the drop-down menus found not to be neutral tools in *Roommates*. 521 F.3d at 1165. Those menus urged users to reveal the types of people with whom they were willing to live—"Straight male(s)," "Gay male(s)," "Lesbians," etc.— and published their answers on profile pages. *Id.* But unlike Snap, the defendant in *Roommates* "require[d] subscribers to [post] using [the] drop-down menu[s]" and limited the matrix of possible content to the few prepopulated responses it created. *Id.* The defendant became an information content provider of posts created through those menus "[b]y requiring subscribers to provide the information as a condition of accessing its service." *Id.* at 1166. But again, Plaintiffs have not alleged Snap requires its users to post with the Filter or mandates a specific kind of post with the Filter. *See* ER77 ¶ 9 (alleging users post "dangerous" content only "in some cases"). Rather, users can choose to display any speed with the Filter. ER13. Because interaction with the Filter is entirely voluntary, and because Snap has no role in shaping how users express themselves with the Filter beyond providing the means to do so, the Filter is a neutral tool.

Second, the Filter is a neutral tool because it does not encourage users to create tortious content. Here, that content is posts made with the Filter that show users "traveling at dangerous speeds." ER85 ¶ 75. Plaintiffs must allege Snap "materially contributed" to the illegality of this

content—for example, by rewarding users who share posts at high speeds—not that Snap merely "facilitate[d]" such posts. *Dyroff*, 934 F.3d at 1099. But because Plaintiffs can point to no affirmative act by which Snap "directly participate[d] in developing the alleged illegality," the Filter is a neutral tool. *Roommates*, 521 F.3d at 1174.

Plaintiffs do not—and cannot—allege Snap "actually rewards its users" for posting content with the Filter displaying a high speed. ER13. To the contrary, Snap explicitly discourages the type of posts with which Plaintiffs take issue. Indeed, Snapchat's terms of service require that users obey traffic and safety laws when using the app. ER121. Snap also warns users against distracted driving when they first open the Filter and reiterates that warning when users record a speed in excess of fifteen miles per hour:



ER111; ER114.

This Court and others have declined to find platforms are developers of content that violates their terms of service or ignores their express warnings. *E.g.*, *Carafano*, 339 F.3d at

1121 (noting defendant's "policies prohibit" the content at issue); *MySpace I*, 528 F.3d at 421 (noting plaintiffs' daughter "disobey[ed] the warning not to give personal information").

And Snap's adaptation of voluntarily provided user data into a speedometer display does not transform it into a co-developer of user posts. Where, as here, the information underlying a post "is entirely provided by [a] third party, . . . the [platform's] choice of presentation does not itself convert it into an information content provider." *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019). For example, this Court held in *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266–70 (9th Cir. 2016), that a platform was not a co-developer of libelous third-party business reviews when it incorporated them into an aggregated metric—a star-rating system of the defendant's design. The CDA barred the claim because the star-presentation did nothing to "enhance the defamatory sting of the message beyond the [information] offered by the user." *Id.* at 1270 (internal quotation marks omitted) (quoting *Roommates*, 521 F.3d at 1172). The Filter functions the same way. It "is essentially a speedometer" that does nothing more than display a user's information and allow them to share it, and it does so whether a user is jogging at five miles per hour or seated on a plane at five-hundred. ER13. Mere "proliferation and dissemination" of allegedly tortious content through a content-neutral presentation "does not equal creation or development of content." *Kimzey*, 836 F.3d at 1271.

Nor does Plaintiffs' implied-encouragement theory render Snap a co-developer of content created with the Filter. In *Roommates*, this Court rejected the argument that, by encouraging certain user behaviors elsewhere, the defendant impliedly encouraged those behaviors in its Additional Comments feature. 521 F.3d at 1174. Rather, "in cases of enhancement by implication," the CDA "must be interpreted to protect" platforms from liability. *Id.* at 1174–75. So too here. Even if "Snap rewards, in unknown, variable, and changing ways, users who

consume Snapchat" in some contexts, it does not, by implication, encourage users to consume Snapchat while speeding. ER79 ¶ 27.

And Plaintiffs' allegation that Snap "knew or should have known" some of its users mistakenly believe they will be rewarded for speeding is insufficient. ER81 ¶ 39. Courts across the country have rejected claims premised on this encouragement-by-notice logic. *See, e.g.*, *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 721–22 (Wis. 2019) (holding CDA immunity applies even when a platform "knows, or should know, that its neutral tools are being used for illegal purposes"); *Marshall's Locksmith*, 925 F.3d at 1269 (platform "on actual notice" of fraudulent content); *Backpage*, 817 F.3d at 20 (platform "knew or should have known" of sex trafficking); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Cal. Ct. App. 2002) (platform "knew or should have known" users sold forgeries).

Because Snap does not require users to interact with the Filter, and because the Filter does nothing to encourage objectionable posts or enhance their illegality, the Filter is a neutral tool. Thus, Snap is not an information content provider of posts made with the Filter. All three elements of the *Barnes* test are satisfied, and the CDA immunizes Snap against Plaintiffs' claims.

II. In the alternative, the Amended Complaint does not allege Snap proximately caused Plaintiffs' injuries.

The Court can also affirm on the alternative ground that the Amended Complaint—like Plaintiffs' original complaint—does not allege Snap proximately caused Plaintiffs' injuries.[4] Because the district court held the CDA bars Plaintiffs' claims, it did not examine whether the Amended Complaint adequately alleges proximate causation. ER15. But the district court

[4] The parties dispute whether California or Wisconsin law governs the Amended Complaint. ER24. But both Snap and Plaintiffs agree "this choice-of-law dispute does not materially affect" the causation analysis because "the two state laws are substantially the same" on this issue. ER24. Under the law of either state, Snap did not proximately cause Plaintiffs' injuries.

dismissed Plaintiffs' original complaint because they had "not sufficiently alleged a causal connection." ER27. And this Court "may affirm the district court's decision on any ground supported by the record." *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004).

The original complaint, like the Amended Complaint, advanced an "encouragement theory" of causation, arguing Snap is liable because the Filter somehow encouraged Davis to drive recklessly. ER27. The district court rejected that argument because the complaint failed to allege "sufficient facts to establish that [Snap] actually encouraged speeding." ER27. Like the Amended Complaint, the original complaint asserted "Snap rewards, in unknown, variable, and changing ways, users who consume Snapchat." ER142–43 ¶ 13. But the district court correctly held this "allegation is too vague and speculative" to support Plaintiffs' claims. ER27. Because Plaintiffs could point to no aspect of the Filter's design, or to any action by Snap, that rewarded or encouraged reckless driving, the district court dismissed the complaint. ER27.

The Amended Complaint suffers from the same defect. It adds three sets of new allegations, none of which support a viable theory of proximate causation. First, Plaintiffs inserted an introduction summarizing their legal arguments. ER76–78 ¶¶ 1–16. Second, they interspersed conclusory quotes from blogs and online articles accusing Snap of encouraging users to drive dangerously. *See, e.g.*, ER76–81 ¶¶ 9–11, 28–30, 35–38. And finally, Plaintiffs added a pair of new allegations—also quoting from online sources—that Snap's warnings not to snap and drive are inadequate. ER85–86 ¶¶ 78–79. But the Amended Complaint still does not—and cannot—allege Snap or the Filter actually rewards users for posting at high speeds or otherwise encourages speeding.

In fact, the Amended Complaint acknowledges that Snap "does not actually reward [sic] its . . . users any prizes or rewards or trophies for recording a 100-MPH-Snap." ER81 ¶ 40. At

best, the Amended Complaint alleges that Snapchat users mistakenly believe Snap encourages speeding and "drive at excessive speeds to see what will happen," ER80 ¶ 31, or that Snapchat engenders "addictive behaviors" that compel users to drive recklessly, ER79 ¶ 27.

But well-settled precedent precludes a finding of proximate causation on those grounds. Courts routinely hold that a plaintiff cannot establish proximate causation by arguing an app or product implicitly encourages dangerous driving. Drivers, not app developers, are responsible for reckless conduct behind the wheel.

In *Modisette v. Apple, Inc.*, 241 Cal. Rptr. 3d 209, 213 (Cal. Ct. App. 2018), the California Court of Appeal affirmed dismissal of a claim against Apple when a driver using the FaceTime app crashed into the plaintiffs. Despite allegations that FaceTime was "addictive" and encouraged "compulsive" behaviors, the court found Apple was not the proximate cause of the accident as a matter of law. *Id.* at 220 n.9, 222. "Rather, [the driver] caused the Modisettes' injuries when he crashed into their car while he willingly diverted his attention from the highway." *Id.* at 225. Similar claims in *Meador v. Apple, Inc.*, 911 F.3d 260 (5th Cir. 2018), fared no better. There, the Fifth Circuit affirmed dismissal of a complaint alleging Apple caused a car crash because the receipt of text messages triggers "an unconscious and automatic, neurobiological compulsion" to text while driving. *Id.* at 263. The court emphasized that the law "places the onus of distracted driving on the driver alone" and found the complaint failed to allege causation as a matter of law. *Id.* at 267.

Plaintiffs' attempt to distinguish this body of precedent is unavailing. They argue *Modisette* and *Meador* are inapposite because the plaintiffs there "claimed that *mobile phones* themselves are dangerous products" while Plaintiffs here "have targeted claims" addressing the specific design of the Filter. Dkt. No. 55 at 24–25. Not so. The *Modisette* plaintiffs alleged Apple

breached its duty of care by failing "to 'lock out' the ability of drivers to utilize the 'FaceTime' application" while driving. 241 Cal. Rptr. 3d at 211. And the *Meador* plaintiffs based their design-defect claim on Apple's decision not to "implement any version of a 'lock-out mechanism'" in its text-messaging application. 911 F.3d at 263. These claims are not only targeted at specific design features rather than mobile phones generally, they are identical to the claims Plaintiffs advance here. Like the plaintiffs in *Modisette* and *Meador*, Plaintiffs allege Snap breached its duty of care because "Snap did not remove or restrict access to Snapchat while travelling at dangerous speeds." ER85 ¶ 75. And like the plaintiffs in *Modisette* and *Meador*, Plaintiffs fail to allege proximate causation.

Even if the Filter were somehow distinguishable from the design features at issue in those cases, Plaintiffs would still need to contend with *Maynard v. McGee*, No. 16SC-89, 2019 WL 6216230, at *2 (Ga. Super. Ct. Nov. 8, 2019) ("*Maynard II*"), which dismissed claims stemming from a car accident involving the Filter because the plaintiffs' "allegations fail[ed] to establish causation." There, as here, a driver allegedly crashed while using the Filter at dangerous speeds. *Id.* at *1. And there, as here, the plaintiffs alleged Snap and the Filter "encouraged" that behavior. *Id.* at *3. But recognizing that "[c]ourts around the country have consistently held that a reckless driver's improper acts break the causal chain," the *Maynard II* court concluded Snap did not proximately cause the accident as a matter of law. *Id.* at *7.

The Court need not deviate from this precedent here. The district court correctly determined Plaintiffs' original complaint failed to adequately allege Snap proximately caused their injuries. ER27. The Amended Complaint does nothing to bolster Plaintiffs' encouragement liability theory and does not allege Snap or the Filter actually encourages speeding. Plaintiffs cannot establish the Filter proximately caused the accident, and the Court should affirm.

CONCLUSION

The Court should affirm the district court's judgment. The district court properly dismissed the Amended Complaint because the Communications Decency Act immunizes Snap against claims—like Plaintiffs'—that would hold it liable as a publisher of third-party content. Alternatively, the Court can affirm because the Amended Complaint does not allege Snap proximately caused Plaintiffs' injuries.

Applicant Details

First Name	**Nikolas**
Last Name	**Fotinos**
Citizenship Status	**U. S. Citizen**
Email Address	**nikolas.fotinos@utexas.edu**
Address	**Address** **Street** **9215 Putnam Dr** **City** **Helotes** **State/Territory** **Texas** **Zip** **78023** **Country** **United States**
Contact Phone Number	**2105191490**

Applicant Education

BA/BS From	**University of Texas-Austin**
Date of BA/BS	**May 2020**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Texas International Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Vladeck, Stephen
svladeck@law.utexas.edu
512-475-9198
Dickerson, Mechele
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Wagner, Wendy
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nikolas Fotinos

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June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at the University of Texas School of Law, and I am pleased to apply for a clerkship position in your chambers for the 2024 term. I am interested in clerking in Virginia because I welcome the opportunity to practice law and live in a new setting. I spent some time living in Washington, DC as an undergraduate and would like to return to the Northeast at the beginning of my legal career.

I was inspired to go to law school by Professor Bill Powers. I took an undergraduate seminar class with him on the philosophy of law during my first semester at the University of Texas. I was captivated by the practice of law. After that class, I changed course and focused my undergraduate time on learning more about legal systems and judicial decision-making, culminating in an honors thesis studying judicial behavior in the Texas State District Court system. Researching for my thesis made me appreciate the judiciary's work and inspired me to strive to be a part of it. I hope to clerk so that I can experience the unique mentoring relationship that a clerkship provides while serving the public as a member of the judiciary.

My application includes a resume, transcript, and a writing sample. Letters of recommendation from Professors Wendy Wagner, Mechele Dickerson, and Steve Vladeck are also included. These recommenders may be reached as follows:

- Professor Wendy Wagner, The University of Texas School of Law
  wwagner@law.utexas.edu, 512-232-1477

- Professor Mechele Dickerson, The University of Texas School of Law
  mdickerson@law.utexas.edu, 512-232-1311

- Professor Steven Vladeck, The University of Texas School of Law
  svladeck@law.utexas.edu, 512-475-9198

In addition, the Law School's clerkship advisor, Kathleen Overly, is available to answer your questions. You may reach her at koverly@law.utexas.edu or 512-232-1316.

Thank you for your time and consideration.

Respectfully,

Nikolas J. Fotinos

Enclosures

Nikolas Fotinos

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EDUCATION

The University of Texas School of Law – Austin, TX
J.D. expected May 2024
GPA: 3.86

- TEXAS INTERNATIONAL LAW JOURNAL, Staff Editor
- Supreme Court Clinic, Fall 2023
- Teaching Assistant in Torts, Fall 2022, Professor Wendy Wagner
- Texas Transactional Skills Competition, Winner – Best Negotiation
- Fordham National Basketball Negotiation Competition – New York, NY
- Gibbs and Bruins Moot Court Competition
- Thad T. Hutcheson Moot Court Competition
- Pro Bono – SPEAK (Special Education Assistance Project)
- Texas Business Law Society, Member

The University of Texas at Austin – Austin, TX
B.A. Government with Honors received May 2020
GPA: 3.84

- Honors thesis: "Electoral Pressures on Judicial Decision Making"
- Student Conduct Board, Senior Member
- Archer Fellow (Fall 2019)

WORK EXPERIENCE

Jones Day – Houston, TX
Summer Associate, May 2022-July 2022, May 2023-July 2023

- Researched and drafted memorandums on various legal issues including specific performance and discovery privilege
- Researched Puerto Rican contract law and drafted a response to a motion to dismiss
- Cataloged and summarized client correspondence over several years for attorney records

Savrick Schumann, LLP – Austin, TX
Senior File Clerk, May 2019-Aug 2019; Dec 2019-May 2021

- Managed a team of three file clerks
- Filed digital and physical case documents for over 14 different attorneys
- Assisted attorneys with projects as needed to improve efficiency and conduct legal research as necessary

ASPCA – Washington, DC
Government Relations Intern, Aug 2019-Dec 2019

- Researched and investigated issues regarding animal welfare
- Met with legislators in Congress to promote animal welfare

Office of Texas State Rep. Eddie Rodriguez (District 51) – Austin, TX
Intern, Jan 2018-May 2018

- Researched and presented bill proposals involving bird protection and craft beer support
- Assisted constituents in solving issues regarding bureaucratic red tape at state agencies

INTERESTS

Collecting Legos, hiking, bowling, learning tennis

Prepared on June 2, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

OFFICIAL NAME: FOTINOS, NIKOLAS JAMES
PREFERRED NAME: Fotinos, Nikolas J.

DEGREE: in progress seeking JD TOT HRS: 60.0 CUM GPA: 3.86

FAL 2021	427	TORTS		4.0	A+	WEW
	531	PROPERTY		5.0	A	SCM
	332R	LEGAL ANALYSIS AND COMM		3.0	B-	WCS
	423	CRIMINAL LAW I		4.0	A+	GBS
SPR 2022	421	CONTRACTS		4.0	A-	OB
	232S	PERSUASIVE WRTG AND ADV		2.0	A	SLP
	433	CIVIL PROCEDURE		4.0	A-	AMD
	434	CONSTITUTIONAL LAW I		4.0	A	WEF
FAL 2022	483	EVIDENCE		4.0	A-	GBS
	381C	CONST LAW II: FREE SPEE		3.0	A	DMR
	385	PROFESSIONAL RESPONSIBI		3.0	A	FSM
	397S	SMNR: SUPRM CRT SHADOW		3.0	A	SIV
	292G	FINANCIAL MTHDS FOR LAW	P/F	2.0	CR	SCM
SPR 2023	284W	LEGAL WRITING, ADV	P/F	2.0	CR	WCS
	486	FEDERAL COURTS		4.0	A-	SIV
	492C	BUSINESS ASSOCIATIONS		4.0	A-	DSS
	296V	PROCEDURE AND POLITICS	P/F	2.0	CR	AMD
	396W	COMPUTER CRIMES		3.0	A	SHA

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.91
SPR 2022	30.0	30.0	30.0	3.83
FAL 2022	45.0	45.0	43.0	3.91
SPR 2023	60.0	60.0	54.0	3.78

06-02-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of the clerkship application of Niko Fotinos, a rising third-year student at the University of Texas School of Law, and a student in my Shadow Docket seminar during the Fall 2022 semester and my Spring 2023 Federal Courts class. As his formidable resume and transcript make clear, Niko is an exceptionally bright and hard-working student, and someone who has excelled across a broad array of law school classes—including both of the ones in which I've had the pleasure of getting to know him. He wrote a fantastic seminar paper about the history of three-judge district courts and their relationship with the Supreme Court's appellate jurisdiction (which ended up with the second-highest grade in a class full of some of the law school's best and brightest), and just missed an A in Federal Courts, as well.

I first got to know Niko in my seminar last fall. My seminars involve a lot of writing—the students prepare weekly response papers reacting to the reading assignments, along with a substantial final paper. And from the beginning of the semester, Niko's writing stood out. Even though the material was especially complicated and dense for a 2L (we spend a lot of time drilling down into the finer points of the different fonts of the Supreme Court's jurisdiction and decision-making authorities), Niko's papers were consistently thoughtful, well-written, and clever. He was quick to identify weaknesses in cases we read, and his questions were always incisive and insightful. He didn't talk in our seminar as much as some of his classmates, but it was never for lack of paying attention. Rather, I think Niko picked his moments—and his contributions were always timely and material. I had the same experience with him in a 66-person Federal Courts class this spring.

Niko's final paper was consistent with what came before. As his paper explains, Congress throughout the twentieth century used the ability to expand and contract the jurisdiction of three-judge district courts as a way of both reining in outlier district judges and helping to force certain types of lower-court rulings onto the Supreme Court's docket. It's an incredibly thorough, well-researched, and well-argued paper, and was one of the top two papers in the entire class. Giving him an A was a no-brainer—as his transcript suggests has been true in most of his other classes.

I'd be happy to discuss Niko's clerkship application further, whether via telephone (512/475-9198) or e-mail (svladeck@law.utexas.edu). He is a thoughtful, gifted, careful young lawyer, and I have no doubt that he will be a real asset for your chambers.

Sincerely yours,

Stephen I. Vladeck

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:
Nikolas Fotinos has asked me to write a letter to support his clerkship application. As a student in both my Federal Civil Procedure class and again in my Procedure and Politics class, I enthusiastically and unequivocally recommend him to you.

Niko, as he is called, was a first-year law student in my Federal Civil Procedure class in Spring 2022. Because students were masked for most of that semester and it was an unusually large class of over one hundred students, I unfortunately did not become as familiar with the students in that class as I have with students in other classes I have taught. Niko stood out, and it was not just because of his height!

Despite the COVID disruptions, I continued to teach using the Socratic method, so students were "on call" in every 4-5 classes. Niko was always prepared and an active participant who often volunteered to respond to questions even when he was not on call. He performed well on the final in the class, which did not surprise me given his engagement in the class. What made Niko stand out was that he seemed genuinely interested in process, which is unusual because (as you may well know) Civ Pro is generally the least liked course in the first-year curriculum.

As a second-year law student, Niko elected to enroll in my Procedure and Politics course in Spring 2023. This is a quirky law course, offered only on a pass-fail basis, that I developed this year. It is essentially an advanced civil procedure class where we discuss various federal and state procedural disputes (including motions to dismiss, Rule 11, and discovery) and non-judicial resolutions of disputes (including arbitration and settlements). The class is unusual because all cases involve former-President of the United States Trump (FPOTUS) or people in (or pulled into) his orbit, including Rudy Giuliani, E. Jean Carroll, Paul Gosar and Ruby Freeman.

I assumed this course would attract maybe 20-25 students, because the course description clearly states that if students did not like civil procedure they should not take the class. Given the litigation activity involving FPOTUS+orbit, 55 students enrolled in the course. In addition to excerpts from law review articles, I assigned readings that typically are not assigned in doctrinal law school classes, including complaints, answers, motions, and unedited court orders. To enjoy this class, students must love process or, at least process as applied to the FPOTUS+orbit.

Students are required to submit pre-class discussion questions and post-class discussion posts. In each class, students are randomly broken into 7-8 small groups where they spend the first half of each class discussing one of the pre-class discussion questions. In the last half of class, one person from each small group relays the group's reflections to the entire class and students from other small groups can then add their views about a particular question.

Niko thrives in this class. He clearly loves procedure as he is taking Federal Courts and has taken another course that explores controversies involving the shadow docket. I float through the small groups each class, and Niko is always engaged in the small group discussions. I recall that he was also one of the students who was willing to state controversial positions early on ("is the rule bad, or do we just not like the outcome in this case?"). Students have not yet submitted their final paper for this class, but given his performance thus far Niko would "pass" even if he failed to submit the final paper.

There is no chance that Niko will not submit the final paper, as he started discussing proposed paper topics with me in the second week of class. He regularly remains after class to continue talking about the matters we covered in class or to run questions by me as he refines his paper topic. While, personally, I have enjoyed bantering with him both in and outside of class during office hours, as this is a P/F class it is unusual to have a student exert the level of effort that Niko has in a P/F advanced civil procedure class.

The law school courses Niko has selected, combined with conversations I have had with him, show that he has a strong and dedicated interest in legal systems, judicial behaviors, and decision-making. As a person, Niko is respectful but confident in his views, which he often expresses with humor with a dash of sarcasm. I have also seen Niko interact with peers outside of class in law school social settings, and he is as collegial outside of class as he is in classroom settings.

Nikolas Fotinos will be a fantastic, responsible, and dependable member of any judicial chambers. I recommend him with no reservations and would be happy to discuss him in more detail if you would like.

Respectfully,

A. Mechele Dickerson
Arthur L. Moller Chair in Bankruptcy Law and Practice
University Distinguished Teaching Professor
The University of Texas School of Law

Mechele Dickerson - mdickerson@law.utexas.edu - 512-232-1311

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my understanding that Nikolas (Niko) Fotinos has applied for a clerkship in your chambers. Niko was a student in my Torts class in the fall of 2021 and the teaching assistant for my Torts class in the fall of 2022. I have thus had numerous opportunities to evaluate his performance in and outside of class. Based on these contacts, I give Niko my highest and most enthusiastic recommendation. He is an excellent student, a thoughtful analyst, and is easily among the best students I have taught at the University of Texas over the last twenty years.

There are several reasons that I give Niko such a strong endorsement. First, Niko was one of the best students in my Torts class, earning the second-highest grade in a highly competitive class of over 100 first-year law students. Niko's final exam was first-rate, and I selected one of his essays to serve as the "class model" showcasing the best in the class. Not only was the writing and organization of each of his essays strong, but Niko's analyses revealed a mastery of the legal material itself. Specifically, Niko was able to identify, prioritize, and explain claims and elements clearly and accurately, as well as to expose and analyze the significance of the many uncertainties arising as a result of gaps in the common law. Niko also excelled in his analysis of the policy issues and was even able to introduce original ideas under the pressure of a long, difficult exam. It was evident from his exam that he is analytically gifted.

Second, Niko was a superb participant in class discussions. Niko was always highly prepared when called on and also regularly volunteered in class discussions, raising insightful questions that cut to the heart of the material. Indeed, as we delved into the technical details, Niko not only was able to see the bigger legal and institutional picture – hovering above the caselaw – but asked brilliant questions about how all of the pieces fit together and applied in practice. It was evident that he strived throughout the course to understand and then to evaluate the larger social context in which those cases and rules appear.

Third, because of Niko's excellent qualities in my Torts class, I hired him to be one of the two Teaching Assistants (TA) for my Torts class this past fall, 2022. Niko's role as TA was to help design four optional assignments that would gradually acclimate the students into exam-taking by building out ever more complex hypotheticals over the course of the semester. Once the assignments were administered, Niko was then responsible for: providing detailed written feedback on each of the students' essays; holding "debriefing" sessions on each of the four assignments; and working with students out of class on any general questions they had about the assignments. Niko was superb in this role and the students gravitated to him for advice and reassurance. Throughout the semester, Niko was always one step ahead of me, taking full responsibility for this feature of the course. Additionally, and in contrast to past years, Niko played an instrumental role in rebooting some partly-failed past assignments, making them vastly more useful as introductory experiences in exam-taking. In our weekly meetings held to discuss the students' progress, I was struck not only by Niko's self-directedness, but by his curiosity and playfulness with legal ideas. He also was quite fond of and eager to bond with the 1Ls in the class.

In sum, I am confident based on these experiences that Niko would be an excellent law clerk. He is very bright, independent, and intent on producing work of only the highest quality. Niko is also personable, delightful to work with, and not at all arrogant or self-involved. I cannot imagine better qualities for a law clerk.
If you have any further questions regarding Niko, please do not hesitate to call or email me.

Best regards,

Wendy E. Wagner
Richard Dale Endowed Chair in Law
The University of Texas School of Law

Wendy Wagner - wwagner@law.utexas.edu - 512-232-1477

Nikolas Fotinos
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Writing Sample

This writing sample is excerpted from a seminar paper written in the Fall 2022 semester for the Seminar on the Shadow Docket at the University of Texas School of Law. I am the sole editor of this excerpt. In this paper titled "Three-Judge Panels and the Shadow Docket," I analyze the potential effects of three-judge panels on the shadow docket. The "shadow docket" refers to the Supreme Court's emergency docket. This paper explores three-judge panels as a potential solution for criticisms of overusing the shadow docket. I explore three-judge district courts' history, operation, and decline. I then explore possible reforms of three-judge panels to allow them to be a viable alternative to help lessen the use of the Supreme Court's shadow docket.

I have modified the structure of this essay for this excerpt. This excerpted section contains the historical overview and operation of three-judge district courts. I have omitted sections I, V, and VI from this excerpt. Section I contained an introduction to the paper. Section V included possible reforms to the three-judge system. Finally, section VI analyzed the potential benefits of three-judge panels on the shadow docket of the Supreme Court. I have edited both the footnote numbers and section numbers.

I. History of Three-Judge Panels

A. Establishment of American Courts

Trial courts in common law jurisdictions generally consist of a single judge.[1] In the United States, Congress, as one of the first acts of the new nation, established single-judge district courts with the Judiciary Act of 1789.[2] Additionally, the Act established circuit courts—multi-judge panels with appellate jurisdiction over district courts.[3] Circuit courts also enjoyed limited original jurisdiction over federal diversity cases but still acted as a panel of three judges.[4] Circuit courts had no judges of their own; each panel consisted of two Supreme Court justices who had to "ride circuit" and a district court judge.[5] Circuit courts sitting in diversity cases was the first three-judge trial court in the United States.[6] In the early twentieth century, Congress passed the Everts Act, which abolished circuit courts and replaced them with the United States Court of Appeals.[7] The new courts of appeals lost any original jurisdiction held by circuit courts and were limited to only hearing cases appealed from district courts.[8]

B. Earnest Implementation of Three-Judge Trial Courts: Response to *Ex parte Young*

Soon after Congress passed the Everts Act, Congress again experimented with the American judiciary. In the early twentieth century, Congress implemented a new type of district court—three-judge district court panels.[9] Three-judge district court panels are a curious invention of the American legal system. At first, Congress only authorized three-judge panels on a minimal scale to address obscure cases like antitrust and actions related to "enforce, enjoin, or vacate Interstate Commerce Commission orders."[10] The need for a new type of court became

[1] Michael E. Solimine & James L. Walker, *Three-Judge District Court: Federalism and Civil Rights, 1954-76*, 72 CASE W. RES. L. REV. 909, 914 (2022).
[2] *Id.*; Judiciary Act of 1789, ch. 20, §§ 2–3, 1 Stat. 73, 73–74 (codified as amended in scattered sections of 28 U.S.C.). *See generally* RICHARD H. FALLON, JR., ET. AL., HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 29–30 (7th ed. 2015).
[3] Judiciary Act of 1789, ch. 20, §§ 4, 11, 1 Stat. 73 74, 78.
[4] *Id.*
[5] David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, MINN. L. REV. 1710, 1715 (2007).
[6] *See* Judiciary Act of 1789, ch. 20, §§ 4, 11, 1 Stat. 73 74, 78.
[7] *See generally* FALLON, ET. AL., *supra* note 2.
[8] *Id.*
[9] Solimine & Walker, *supra* note 1, at 914.
[10] Michael T. Morley, *Vertical Stare Decisis and Three-Judge Courts*, 108 GEO. L.J. 699, 719 (2020).

increasingly evident in the early 1890s.[11] States and Congressmen were becoming increasingly suspicious of a single judge enjoining state laws on federal constitutional grounds.[12] District court judges consistently enjoined state regulatory laws passed during the Progressive Era.[13] These regulations severely hampered states' attempts at implementing Progressive legislative goals like working hour caps, minimum wage laws, and standard carrier fare caps.[14] Under the equity rules of the time, judges could enjoin state laws *ex parte* and kept in place indefinitely.[15]

Congress implemented three-judge panels in response to the Supreme Court's decision in *Ex parte Young*.[16] The Supreme Court decided *Ex parte Young* in 1908 and held that the Eleventh Amendment does not bar suits against state officers in their official capacity.[17] In *Ex parte Young*, Minnesota passed a law that capped the rates that railroads could charge for passengers and cargo.[18] Railroad companies sued the State and Edward Young, the attorney general of Minnesota, in his official capacity as the attorney general.[19] The Court held that the law was an unconstitutional breach of an individual's right to contract freely.[20] However, the Court did not allow the suit to proceed against Minnesota because of the Eleventh Amendment.[21] But, the Court held that it was not a violation of Eleventh Amendment sovereign immunity to sue state officials (rather than the State itself) from carrying out the unconstitutional laws.[22] Accordingly, the injunctive suit challenging the law was allowed to proceed against Young individually in his capacity as an official of the State.[23]

The decision immediately generated a backlash. Many scholars described the decision as spawning a "storm of controversy."[24] In Congress, Senator Overman of North Carolina stated on the floor of the Senate that when "one little judge stand[s] against the whole State . . . you find

[11] Solimine & Walker, *supra* note 1, at 914.
[12] *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299, 299 (1963).
[13] Solimine & Walker, *supra* note 1, at 915.
[14] *Id.*
[15] *Id.*
[16] Michael E. Solimine, *Congress,* Ex parte Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 114 (2008).
[17] *Ex parte* Young, 209 U.S. 123, 167 (1908).
[18] *Id.* at 128.
[19] *Id.*
[20] *Id. See also* Lochner v. New York, 198 U.S. 45 (1905).
[21] *Ex parte* Young, 209 U.S. at 167.
[22] *Id.* at 167-68.
[23] *Id.* at 168.
[24] Steffel v. Thompson, 415 U.S. 452, 465 (1974).

the people of the State rising up in rebellion."[25] Congress quickly began to consider its options to limit the effects of *Ex parte Young*.

Congress moved swiftly, considering several options to limit the impact of *Ex parte Young*.[26] One proposal advocated stripping federal jurisdiction from all cases seeking to enjoin state laws.[27] Another less extreme proposal would "require[e] federal judges to take certain additional steps when considering constitutional challenges to state statutes."[28] However, in 1910, Congress settled on its solution.

C. Structure and Operation of Three-Judge District Courts

In 1910, Congress took a middle-ground approach and created three-judge district courts. Congress codified three-judge panels at 28 U.S.C. § 2281, and the statute reads:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284[29] of this title.[30]

The original statute envisioned three-judge panels composed "of three judges, one being a circuit judge or Supreme Court Justice."[31] Another unique feature is that the parties are entitled to direct appellate review by the Supreme Court.[32] The Supreme Court must decide the case on the merits—whether with full arguments or summarily.[33]

Congress created the three-judge panels so that a single federal district judge would not solely be able to enjoin state laws.[34] Congress thought it was fairer for a panel of three judges to moderate each other and ultimately produce a more politically moderate decision.[35] An

[25] Solimine, *supra* note 16, at 915 (quoting 45 Cong Rec. 7256 (1910)).
[26] Solimine & Walker, *supra* note 1, at 916.
[27] *Id.*
[28] *Id.*
[29] Section 2284 governs the procedural requirements of three-judge panels and it is discussed below.
[30] Act of Mar. 3, 1911, ch. 321, §266, 36 Stat. 1162 (codified at 28 U.S.C. § 2281), *repealed by*, Pub. L. 94–381, §§ 1, 2, Aug. 12, 1976, 90 Stat. 1119.
[31] *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299, 299 (1963).
[32] *Id.*
[33] Solimine & Walker, *supra* note 1, at 917.
[34] *Id.*
[35] *Id.*

American Law Institute study stated, "[t]he moral authority of a federal court order is likely to be maximized if the result cannot be laid to the prejudices or political ambitions of a single district judge."[36] In addition, Congress wanted to limit the ability of district courts to issue permanent injunctions of Progressive state laws.[37] In 1905, the Supreme Court handed down the landmark decision *Lochner v. New York*.[38] *Lochner* struck down a pro-labor law passed by New York state on freedom of contract grounds.[39] Subsequently, the Court used *Lochner* as a precedent to strike down Progressive legislation enacted by states nationwide.[40] One example was *Ex parte Young* itself, which struck down rail rate limit legislation.[41]

Furthermore, Congress determined that the three-judge panels lend more credibility to its decisions. If a three-judge panel enjoined state statute, at least two judges held that the law violated the Constitution.[42] Also, with a direct appeal to the Supreme Court, the Court could swiftly correct the panel's decision if it got it wrong. In contrast, single-judge district court rulings must typically go through the Courts of Appeals before reaching the Supreme Court.[43] The Supreme Court must also render a decision on the merits.[44] The decision could come with full briefing and argument or summarily, but "either way[,] the Supreme Court must decide the dispute on the merits."[45] The direct appeal requirement emphasizes that these decisions exhibit particular importance. It signals to district courts that they should not lightly decide actions seeking to enjoin state laws.

As Congress initially envisioned, three-judge panels were only empaneled for suits seeking injunctions against *state* legislation.[46] After President Roosevelt's failed court-packing scheme, he pursued other ways to reign in the federal judiciary hostile to the New Deal.[47]

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[36] STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1, 320 (Am. L. Inst. 1969).
[37] *Id.*
[38] *Lochner*, 198 U.S. at 64-65.
[39] *Id.* at 64.
[40] *See e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down federal regulation against child labor); Bailey v. Drexel Furniture Co. ("Child Lab. Tax Case"), 259 U.S. 20 (1922) (invalidating a tax on employers who use child labor); Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923) (striking down a minimum wage law for women).
[41] *Ex parte* Young, 209 U.S. 123, 167 (1908).
[42] *See* 28 U.S.C. § 2284.
[43] Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 422 (2020).
[44] *Id.*
[45] *Id.* (internal quotations omitted).
[46] *See* 28 U.S.C. § 2281.
[47] Solimine & Walker, *supra* note 1, at 917.

Congress eventually settled on expanding three-judge panels to include suits seeking to enjoin federal statutes as well as state laws.[48] The new statute, as codified in §2282, states the following:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless application therefor is heard and determined by a district court of three judges under section 2284 of this title.[49]

The Supreme Court interprets §§ 2281 and 2282 narrowly. As the Supreme Court noted in *Phillips v. United States*, "to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute . . . .'"[50]

Section 2284 lays out the procedure for empaneling a three-judge district court.[51] First, a litigant must file a request for a three-judge panel.[52] A single judge will determine whether a three-judge panel is required.[53] The Supreme Court has said that the statute requires the district judge to "first examin[e] the allegations in the complaint" to ensure the case qualifies under the statute and federal jurisdiction is present. [54] If a panel is required, a single federal judge is not permitted to grant a motion to dismiss § 2284(b)(3) prohibits a single judge from "enter[ing] judgment on the merits."[55] If a district court judge determines that a three-judge panel is necessary, they will notify the Chief Judge of the Circuit of which the district court is a part.[56] The chief judge will appoint two more judges, but "at least one of whom shall be a circuit

[48] Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 751, 752 (codified at 28 U.S.C. § 2282) (repealed 1976).
[49] *Id.* Section 2282 is basically the same statute as § 2281 but entirely rewritten to apply to the federal government. Expressing his puzzlement (and outrage) that the drafters of the statute did not simply amend § 2281 to include Acts of Congress, Professor Currie wrote "[t]he reviser, who failed to combine §§ 2281 and 2282, should be immersed for twelve years in a pot of his own verbiage." David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. OF CHI. LAW REV. 1, 12 n.67 (1964).
[50] Phillips v. United States, 312 U.S. 246, 251 (1941).
[51] 28 U.S.C. § 2284.
[52] *Id.*
[53] *Id.*
[54] Shapiro v. McManus, 577 U.S. 39, 44 (2015).
[55] *Id.* (citing § 2284(b)(1)).
[56] 28 U.S.C. § 2284(b)(1).

judge."[57] Additionally, if the action is against a state, the State is afforded at least five days' notice.[58]

Even in a three-judge panel, a single judge has broad powers to conduct proceedings alone. Principally, a single judge may "conduct all proceedings" and "enter all orders" except those reserved for the full panel.[59] For example, a single judge may grant a temporary restraining order if necessary.[60] Any action a single judge takes "may be reviewed by the full court at any time before final judgment."[61] In contrast, a single judge is not allowed "to appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction . . . ."[62] These decisions are reserved for the entire panel.[63] Finally, the full three-judge panel must conduct the trial and enter final judgment.[64] Final judgment importantly includes summary judgment motions and motions to dismiss, thus reserved for the full panel.[65] The three-judge panel acts like a single-judge district court.

Another critical feature of three-judge panels is that decisions rendered by the panels are directly appealable as a right to the Supreme Court.[66] The direct appeal further encapsulates the importance of the issues Congress tasked three-judge panels to hear. The Supreme Court closely guards this direct appeal right. If a lower court improperly convenes a three-judge panel, the Supreme Court will vacate the proceeding and mandate that the parties appeal to the proper court of appeals.[67]

Further, the Supreme Court has held that three-judge district court panels should be convened sparingly, and the district courts should narrowly interpret § 2284.[68] The Supreme

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[57] *Id.*
[58] 28 U.S.C. § 2284(b)(2).
[59] 28 U.S.C. § 2284(b)(3).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] FED. R. CIV. PRO. 56; FED. R. CIV. PRO. 12(b).
[66] 28 U.S.C. § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit . . . by a district court of three judges.").
[67] *See* Bd. of Regents of Univ. of Texas Sys. v. New Left Ed. Project, 404 U.S. 541 (1972).
[68] *Id.* at 545.

Court has held that three-judge panels are not enacted "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[69] The Supreme Court has also held that three-judge panels are not required "when the constitutional attack upon the state statutes is insubstantial."[70] "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'"[71] However, decisions "that merely render claims of doubtful or questionable merit" are not considered insubstantial to convene a three-judge panel.[72]

D. Application in the Warren Court Era—A Vehicle to Advance Civil Rights

In the mid-1950s, three-judge courts initially handled several landmark civil rights cases, which eventually made it to the Supreme Court.[73] Two banner cases are *Brown v. Board of Education*[74] and *Roe v. Wade*.[75] Both cases are (and were, respectively) landmark civil rights cases that changed the country's political fabric.

In *Brown*, the Supreme Court famously outlawed racial segregation in school systems. The Court unanimously held "that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[76] The decision was a massive win for the civil rights movement and dealt a significant blow to segregation.

The *Brown* decision consolidated four lower court decisions under the *Brown* name. Three of the four consolidated cases came from three-judge district court panels.[77] One case came from Virginia and held that the statute mandating separate education was not invalid, but the conditions of the segregated schools were uneven and needed to be corrected.[78] The second case came from South Carolina and ruled similarly to the Virginia case that segregation was

[69] *Phillips*, 312 U.S. at 251.
[70] *Id.*
[71] *Id.* (internal citations omitted).
[72] *Id.*
[73] *E*.g., Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959) (mem.) (three-judge court), *rev'd*, 369 U.S. 186 (1962).
[74] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).
[75] Roe v. Wade, 410 U.S. 113 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[76] *Brown*, 347 U.S. at 495.
[77] The fourth, a case from Delaware, was initially brought in the Delaware Court of Chancery, a state court. The lower court granted the relief sought was the only court in the consolidated cases to outlaw segregation in schools. Belton v. Gebhart, 87 A.2d 862, 871 (Del. Ch. 1952).
[78] Davis v. Cnty. Sch. Bd. of Prince Edward Cnty., Va., 103 F. Supp. 337, 340 (E.D. Va. 1952) (three-judge court).

allowed, but the separate education facilities needed to be "more equal."[79] The third case came from Kansas and is the namesake of the consolidated cases.[80] Like the courts in Virginia and South Carolina, the court in *Brown* upheld segregation.[81]

The decisions from three-judge panels immensely benefited civil rights groups fighting for desegregation. Even though all the lower federal courts protected segregation, the three-judge panels allowed the parties, as a right, to directly appeal to the Supreme Court for a merits decision. The issue of desegregation was forcibly thrust directly upon the Court, forcing it to consider school segregation on its merits. These efforts culminated in *Brown v. Board*.[82] Because of three-judge courts, even though they ruled in favor of segregation, the country eliminated school segregation faster than it would have if it had progressed through the usual court system.

Another landmark case that came to the Supreme Court on direct appeal from a three-judge panel was *Roe v. Wade*.[83] In *Roe*, an anonymous individual challenged criminal abortion restrictions that Texas enacted.[84] *Roe* held that "[statutes banning abortion] . . . without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment."[85] Again, like *Brown*, *Roe* was decided by a three-judge panel empaneled in Texas.[86] Also, like *Brown*, the mandatory direct appeal of three-judge panel courts forced the Supreme Court to address the issue of abortion on its merits. Ultimately, the Supreme Court held that the Constitution protected abortion.[87]

In sum, three-judge panels led to increased decisions advancing civil and individual rights during the Warren Court Era. The mandatory direct appeal to the Supreme Court forced the Court to hear cases implicating civil rights and decide these cases on their merits. These landmark decisions came far faster than they would have progressed through the normal appellate process.

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[79] Briggs v. Elliott, 103 F. Supp. 920, 923 (E.D.S.C. 1952) (three-judge court).
[80] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 98 F. Supp. 797 (D. Kan. 1951) (three-judge court).
[81] *Id.* ("*Plessy* and *Lum* have not been overruled . . . and [] they still presently are authority for the maintenance of a segregated school system in the lower grades.").
[82] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 495 (1954).
[83] Roe v. Wade, 410 U.S. 113 (1973).
[84] *Id.* at 116.
[85] *Id.* at 164.
[86] Roe v. Wade, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970) (three-judge court).
[87] *Contra* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

II. Criticisms and the Decline of Three-Judge Panels

In the 1970s, three-judge panels began to fall out of favor with the academic community, the federal judiciary, and ultimately Congress. Judicial scholars began to see the three-judge panels as a waste of valuable resources. One of the fiercest opponents of three-judge panels was Chief Justice Warren Burger. He wrote, "[w]e should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work."[88] The chief justice also likely had another reason for abolishing or substantially limiting the jurisdiction of three-judge panels. If Congress eliminated three-judge panels, the Supreme Court would have a drastically reduced workload. The number of required direct appeals to the Supreme Court would decrease dramatically.[89]

Two significant criticisms emerged from the current three-judge panel system. First, was that the panels were too inefficient in coming to resolutions. Second, the statute was ambiguous when courts needed to impanel three-judge panels. Addressing the first point, Professor Currie noted that "[c]onsuming the energies of three judges to conduct one trial is prima facie an egregious waste of resources. It seems fair to assume that men selected for the bench are capable and impartial enough to do their job without assistance, and cries of overcrowded dockets argue persuasively for economy."[90] In addition, three-judge panels started taking on more and more cases. As a result, three-judge panels began drawing away increasingly scarce judicial resources and capacity. As Professor Douglass and Professor Solimine observed, "[i]n the 1960s and 1970s, three-judge district courts produced a large portion of federal courts work, and at [the] time comprised a third of the Supreme Court's docket."[91] Opponents of three-judge panels argued that the Supreme Court was forced to hear too many cases and that the Court could not effectively screen all the cases that came before it.[92]

Regarding the second major criticism, the *Board of Regents v. The New Left Education Project* case perfectly highlights the statute's ambiguity.[93] The case involved the constitutionality of a state regulation that controlled what student editors could say in school papers at the

[88] Chief Justice Warren E. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972).
[89] *See* Douglas & Solimine, *supra* note 43, at 420.
[90] Currie, *supra* note 49, at 2.
[91] Douglas & Solimine, *supra* note 43, at 420.
[92] Michael J. Mullen, *Improving Judicial Administration by Repealing the Requirements for Three-Judge District Courts*, 20 CATH. L. REV. 372, 377 (1974).
[93] Bd. of Regents of Univ. of Texas Sys. v. New Left Ed. Project, 404 U.S. 541 (1972).

University of Texas at Austin.[94] No other public or private university in Texas was subject to the regulation.[95] As a result, the parties were unsure if a three-judge panel was needed to decide the case. The Board hired Charles Alan Wright, an expert on civil procedure in federal courts, who determined that the case required a three-judge court.[96] The chief justice of the Fifth Circuit agreed and empaneled the three-judge panel.[97] Upon losing at trial, the Board of Regents appealed the case to the Supreme Court.[98] The Court held that the lower court improperly convened the three-judge panel.[99] The Court held that a three-judge panel is only required in cases that "ha[ve] statewide application or effectuate[] a statewide policy."[100] Three-judge panels are unnecessary "where the statute or regulation is of only local import."[101] The Court further held that because this regulation only applied to a single Texas university, the regulation did not have general statewide applicability.[102] The Supreme Court vacated the judgment and remanded it to be heard by a single district court judge.[103]

Related to judicial efficiency is the issue of logistics. Until the twenty-first century, judges had to travel to hear three-judge panel cases physically. Scholars argued that, by abolishing three-judge panels, "circuit judges will no longer have to miss their regular turn sitting in panels . . . [and] they will not have to lose a day or two in travel and thus should be able to utilize their time more effectively."[104]

Judges and academics were split on whether the reformation or abolition of three-judge panels was more effective. Persuasive voices in the federal judiciary, like Judges Henry Friendly and J. Skelly Wright, supported limiting three-judge panels.[105] On the other hand, Charles Alan Wright opposed reform efforts, instead advocating for the complete abolishment of three-judge

[94] *Id.* at 542.
[95] *Id.*
[96] Mullen, *supra* note 92, at 375. *See generally* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1987).
[97] Mullen, *supra* note 92, at 375.
[98] *New Left Educ. Project*, 404 U.S. at 545.
[99] *Id.*
[100] *Id.* at 542.
[101] *Id.*
[102] *Id.* at 544.
[103] *Id.* at 545.
[104] Mullen, *supra* note 92, at 376.
[105] Solimine, *supra* note 16, at 142.

panel.[106] Judicial groups such as the Judicial Conference of the United States also recommended abolishing three-judge panels to Congress.[107]

Opposition to three-judge panels was not unanimous. One significant organization wanting to preserve three-judge courts was the NAACP.[108] The NAACP wanted to keep the three-judge panels because the panels created important civil rights precedents.[109] Appeals from three-judge panels also forced the Supreme Court to confront civil rights cases directly.[110] Subsequent scholarship has confirmed this finding, concluding that "considerable anecdotal and empirical evidence demonstrates that three-judge district courts, and the prospect of convening such courts, played a particularly significant role in civil rights litigation."[111]

The academic-supported reform efforts eventually prevailed. Congress repealed §§ 2281 and 2282, abolishing three-judge panels in all cases except in apportionment or when a specific law calls for them.[112] The three-judge experiment ended, and the federal judiciary returned to a structure dominated by single-judge district courts.

III. Current State of Three Judge Panels

After the reforms passed in 1976, the use of three-judge panels significantly decreased. However, three-judge panels are not entirely absent from the federal judiciary. Three-judge panels still exist in some limited capacity as codified in 28 U.S.C. § 2284(a).[113] Section 2284(a) now identifies when a three-judge district court is needed.[114] The statute proscribes the following: "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."[115] One such additional statute requires three-judge district court panels in challenges to voting requirements under the Voting Rights Act.[116] Before *Shelby County v. Holder* found the preclearance

[106] *Id.*
[107] Mullen, *supra* note 92, at 376.
[108] *Id.* at 143.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 126.
[112] *See* 28 U.S.C. § 2284(a).
[113] 28 U.S.C. § 2284(a).
[114] *Id.*
[115] *Id.*
[116] 52 U.S.C. § 10304(a).

requirement in the Voting Rights Act unconstitutional,[117] states (mainly Southern) could preclear their election laws before a three-judge court convened in the District of Columbia.[118]

Congress has also authorized three-judge courts for suits under specific laws deemed of particular importance.[119] Some of the current laws that use three-judge panels include the following: The Bipartisan Campaign Reform Act of 2002,[120] The Presidential Election Campaign Fund Act,[121] The Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985,[122] The Cable Television Consumer Protection and Decency Act of 1992,[123] The Communications Decency Act of 1996,[124] The Telecommunications Act of 1996,[125] The Line Item Veto Act of 1996,[126] and the Census reform legislation passed in 1998 (Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998).[127] All of these laws require three-judge panels to hear disputes (usually convened in the District of the District of Columbia).

Even though the laws still employing three-judge panels are niche, three-judge panels still initially hear important cases. The most high-profile case handled by three-judge district court panels recently was *Citizens United*.[128] *Citizens United* was a landmark case appealed to the Supreme Court from a three-judge district court panel holding that the Bipartisan Campaign Reform Act's prohibition of all independent expenditures by corporations and unions violated

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[117] 570 U.S. 529, 557 (2013).
[118] 52 U.S.C. § 10304(a).
[119] For a more in-depth discussion of these laws *see* Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 130 (2014).
[120] Pub. L. No. 107-155, § 403(a), 116 Stat. 81, 113.
[121] Pub. L. No. 92-178, sec. 801, § 9011(b)(2), 85 Stat. 497, 570 (1971) (codified at 26 U.S.C. § 9011(b)(2) (2012)). *But see* FEC v. Nat'l Conservative Political Action Comm'n, 470 U.S. 480, 484–85 (1985) (holding that § 9011(b) applies to suits for declaratory judgments concerning the constitutionality of the Fund Act); 26 U.S.C. § 9010(c) (2012) (authorizing three-judge district courts to adjudicate certain actions for injunctive or declaratory relief to enforce the Act).
[122] Pub. L. No. 99-177, § 274(a), 99 Stat. 1037, 1098.
[123] Pub. L. No. 102-885, § 23, 106 Stat. 1460, 1500.
[124] Pub. L. No. 104-104, § 561, 110 Stat. 133, 142-43.
[125] Pub. L. No. 104-104, § 561(a), 110 Stat. 56, 142.
[126] Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211. The law was struck in Clinton v. City of New York, 524 U.S.417, 449 (1998) (holding line-item veto unconstitutional as violation of separation of powers).
[127] Pub. L. No. 105-119, § 209(e), 111 Stat. 2440, 2480.
[128] Citizens United v. Fed. Election Comm'n, 530 F. Supp. 2d 274 (D.D.C. 2008) (denying preliminary injunction); Citizens United v. Fed. Election Comm'n, No. CIV.A.07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008) (mem.) (three-judge court) (denying plaintiff's motion for summary judgement and granting defendant's motion for summary judgement).

the First Amendment's protection of free speech.[129] The case ignited a national debate about the potential influences of businesses on elections.[130] From the date of the decision, lawmakers continuously introduced a constitutional amendment seeking to overturn *Citizens United*.[131] The case is a landmark decision in First Amendment jurisprudence that expanded campaign finance limits established by *Buckley v. Valeo*.[132]

[129] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43 (2010).
[130] *See* Justin Levitt, *Confronting the Impact of* Citizens United, YALE L. & POL. REV. 217, 217 (2021).
[131] Lauren Sforza, *Democrats introduce constitutional amendment to reverse Citizens United campaign finance ruling*, THE HILL (Jan. 19, 2023, 2:05 PM), https://thehill.com/homenews/house/3819814-democrats-introduce-constitutional-amendment-to-reverse-citizens-united-campaign-finance-ruling.
[132] 424 U.S. 1 (1976).

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